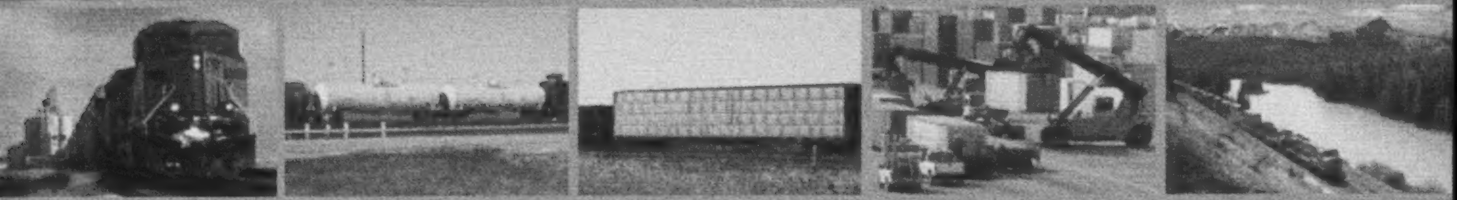
Transport Canada Transports Canada

TP 15042
(01/2011)

# Rail Freight
# Service Review



## FINAL REPORT

January 2011

Canada

Please direct your comments, orders and inquiries to:

The Order Desk
Multimedia Products and Services
Transport Canada (AARA-MPS)
2655 Lancaster Road
Ottawa ON K1B 4L5

Telephone: 1-888-830-4911 (in North America)
613-991-4071 (other countries)
Fax: 613-991-1653
E-Mail: MPS@tc.gc.ca

© Her Majesty the Queen in Right of Canada, as represented by the Minister of Transport, 2010.

Permission is granted by the Department of Transport, Canada, to copy and/or reproduce the contents of this publication in whole or in part provided that full acknowledgment is given to the Department of Transport, Canada, and that the material be accurately reproduced. While use of this material has been authorized, the Department of Transport, Canada, shall not be responsible for the manner in which the information is presented, nor for any interpretations thereof.

The information in this publication is to be considered solely as a guide and should not be quoted as or considered to be a legal authority. It may become obsolete in whole or in part at any time without notice.

ISBN: 978-1-100-51891-6
Catalogue No.: T42-3/2-2011

TP 15042
(01/2011)

TC-1004219

# TABLE OF CONTENTS

1. INTRODUCTION ........ 1

1.1 RATIONALE ........ 1

1.2 PANEL MANDATE ........ 2
1.2.1 The Panel's Terms of Reference ........ 3

1.3 PANEL PROCESS ........ 3

2. CURRENT REGULATORY FRAMEWORK ........ 5

2.1 TRANSPORTATION POLICY STATEMENT ........ 5

2.2 LEVEL OF SERVICE ........ 6

2.3 COMPETITIVE ACCESS PROVISIONS ........ 7

2.4 FINAL OFFER ARBITRATION ........ 8

2.5 ANCILLARY CHARGES ........ 8

2.6 RUNNING RIGHTS ........ 9

2.7 COMMERCIAL MECHANISMS ........ 9

3. SUMMARY OF PHASE I RESEARCH ........ 11

3.1 ANALYSIS OF RAILWAY FULFILLMENT OF SHIPPER DEMAND AND TRANSIT TIMES ........ 11

3.2 DESCRIPTION OF CANADA'S RAIL-BASED FREIGHT LOGISTICS SYSTEM ........ 14

3.4 SURVEY OF SHIPPERS ........ 16

3.5 SURVEY OF OTHER STAKEHOLDERS: TERMINAL OPERATORS, PORTS AND SHIPPING LINES ........ 17

3.6 SERVICE ISSUES IN REGULATED INDUSTRIES OTHER THAN CANADIAN RAIL FREIGHT INDUSTRY ........ 18

4. KEY ISSUES AND SOLUTIONS IDENTIFIED BY STAKEHOLDERS.... 19

- 4.1 STAKEHOLDER COMMENTARY PRIOR TO THE INTERIM REPORT........................ 19
  - 4.1.1 Key Issues Identified By Non-Railway Stakeholders........................................20
  - 4.1.2 Key Solutions Identified By Non-Railway Stakeholders........................................25
  - 4.1.3 Key Issues and Solutions Identified by CN and CP ........................................29
- 4.2 STAKEHOLDER COMMENTARY IN RESPONSE TO INTERIM REPORT.................. 33
  - 4.2.1 Main Comments From Non-Railway Stakeholders........................................33
  - 4.2.2 Main Comments From CN and CP........................................35
  - 4.2.3 Update on Recent CN and CP Initiatives........................................35
- 4.3 CONCLUSION ........................................ 36

5. CONSIDERATIONS ........................................ 37

- 5.1 IMPORTANCE OF EFFECTIVE SUPPLY CHAINS AND BALANCING STAKEHOLDER INTERESTS........................................ 37
- 5.2 COMPLEXITY OF THE RAIL-BASED LOGISTICS SYSTEM ........................................ 38
- 5.3 COMPETITION AND RAILWAY MARKET POWER ........................................ 38
- 5.4 RECENT RAILWAY INITIATIVES........................................ 42
- 5.5 SUSTAINABILITY........................................ 42
- 5.6 IMPROVED PROCESSES TO DRIVE RESULTS........................................ 42
- 5.7 OTHER CONSIDERATIONS........................................ 43
- 5.8 CONCLUSION: THE NEED FOR CHANGE ........................................ 45

6. KEY RECOMMENDATIONS .......... 47

6.1 INTRODUCTION .......... 47

6.2 GENERAL APPROACH .......... 48

6.3 THE RAILWAY COMMITMENT LETTERS .......... 49

6.4 COMMERCIAL APPROACH .......... 49
- 6.4.1 Notification of Service Changes .......... 50
- 6.4.2 Implementation of Service Agreements .......... 50
- 6.4.3 Establishment of a Dispute Resolution Process .......... 51
- 6.4.4 Enhanced Performance Reporting .......... 52
- 6.4.5 Sustainability .......... 55

6.5 RECOMMENDED REGULATORY FALLBACK PROVISIONS .......... 56
- 6.5.1 Notification of Service Changes .......... 56
- 6.5.2 Implementation of Service Agreements .......... 56
- 6.5.3 Regulated Dispute Resolution Process .......... 57
- 6.5.4 Enhanced Performance Reporting .......... 58

6.6 IMPLEMENTATION OF LEGISLATION .......... 59

6.7 IMPLEMENTATION OF THE PANEL'S RECOMMENDATIONS .......... 61

7. OTHER ISSUES IDENTIFIED BY NON-RAILWAY STAKEHOLDERS... 63

7.1 OTHER ISSUES WITHIN THE PANEL'S MANDATE .......... 63

7.2 OTHER ISSUES BEYOND THE PANEL'S MANDATE .......... 65

Appendix A – RAIL FREIGHT SERVICE REVIEW PANEL MEMBERS' BIOGRAPHIES ........ 69

Appendix B – TERMS OF REFERENCE FOR A REVIEW OF RAIL FREIGHT SERVICE ........ 71

Appendix C – RAIL FREIGHT SERVICE REVIEW PANEL TERMS OF REFERENCE ........ 79

Appendix D – NOVEMBER 9, 2009 CALL LETTER FOR SUBMISSIONS ........ 81

Appendix E – LIST OF STAKEHOLDERS WHO PROVIDED SUBMISSIONS ........ 85

Appendix F – LIST OF STAKEHOLDERS CONSULTED ........ 89

Appendix G – OCTOBER 8, 2010 CALL LETTER FOR SUBMISSIONS ON THE INTERIM REPORT ........ 91

Appendix H – INTERIM REPORT RECOMMENDATIONS COMMERCIAL APPROACH ........ 93

Appendix I – LEVEL OF SERVICES ........ 95

Appendix J – FINAL OFFER ARBITRATION ........ 99

Appendix K – ANCILLARY CHARGES ........ 107

Appendix L – PHASE I RESEARCH COMMISSIONED BY TRANSPORT CANADA ........ 109

Appendix M – CN's COMMITMENT LETTERS ........ 111

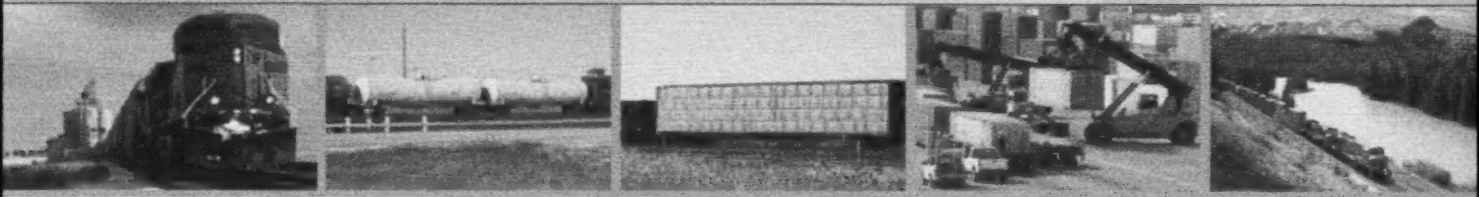
Appendix N – CP's COMMITMENT LETTERS ........ 121

Appendix O – JUNE 9, 2010 QGI LETTER TO PANEL ........ 127

Appendix P – PROPOSED FRAMEWORK FOR THE 2013 ASSESSMENT FROM THE INTERIM REPORT ........ 129

Appendix Q – GLOSSARY OF ACRONYMS ........ 131

# CHAPTER 1



## 1. INTRODUCTION

The Honourable Rob Merrifield, Minister of State (Transport) appointed the Rail Freight Service Review Panel in September 2009. (See Appendix A for biographies of Panel members.) The Panel was directed to conduct a review of service issues and problems related to the rail-based logistics system in Canada and to submit recommendations aimed at improving the efficiency, effectiveness and reliability of service within the system, facilitating economic growth and trade expansion and improving accountability among stakeholders.

The Report consists of seven chapters as follows:

- **Chapter 1** contains a brief description of the rationale and scope of the review as well as the Panel's mandate and process;
- **Chapter 2** describes the so-called "shipper protection" provisions of the *Canada Transportation Act* (CTA);
- **Chapter 3** summarizes the research work in support of the review;
- **Chapter 4** discusses key issues and solutions identified by stakeholders;
- **Chapter 5** contains the considerations that the Panel used to guide the development of its final recommendations;
- **Chapter 6** describes the final recommendations to address key issues; and
- **Chapter 7** discusses the Panel's final recommendations regarding other issues.

### 1.1 RATIONALE

The CTA is the framework for the economic regulation of railways in Canada. The CTA reflects the evolution of transportation policy, including rail transportation policy, over time. There was a comprehensive statutory review of the CTA in 2000-01. The CTA Review Panel concluded that "Canada's rail freight system works well for most users most of the time." Nonetheless, the Panel recommended some changes to the Act. Between 2001 and 2007, there were extensive consultations with railways[1], shippers and others on potential changes to the shipper protection provisions. A number of bills to amend the CTA died on the Order Paper when Parliament was prorogued between 2003 and 2007.

During this period, the government received an increasing number of complaints from shippers and others about poor rail service. Stakeholders identified a number of chronic and widespread problems including poor railway performance (both overall car supply and spotting performance of cars, in particular cars supplied versus cars ordered) and the inability of railways to recover from service disruptions because of the railways' practice of aggressive asset utilization and balanced operations. When the government tabled amendments to the shipper protection provisions in May 2007, it announced that it would initiate a review of rail freight service once the proposed amendments had been passed. The amendments were passed and received Royal Assent in February 2008. After consultations with interested parties, the government released in August 2008, the terms of reference (Appendix B) for the Rail Freight Service Review.

---

[1] Please note that throughout this report, the reference to "the railways" generally means Canadian National Railway and Canadian Pacific Railway.

The review had two phases:

- **Phase I** consisted of quantitative and qualitative analytical work (summarized in Chapter 3) carried out by independent consultants for Transport Canada. This research work was important input for the Panel portion of the review.
- **Phase II** was the Panel process with a mandate to develop recommendations to address service problems within the rail-based logistics system, based on the results of the analytical phase, stakeholder input and other relevant information.

> *"The fact that we are moving forward with this review is good news for shippers of a broad range of commodity groups and will benefit grain farmers as well. Our priority is to have an effective, efficient, consistent and reliable rail transportation supply chain."*
>
> **The Hon. Lawrence Cannon, Minister of Transport, Infrastructure and Communities, August 12, 2008, Transport Canada press release.**

## 1.2 PANEL MANDATE

The terms of reference for the review were established by the government following consultations with stakeholders. In accordance with the final terms of reference, the objectives of the Rail Freight Service Review were to:

- conduct a review of the rail-based logistics chain (including railways, shippers, terminal operators, ports and vessel operators) with a focus on service provided to Canadian shippers and customers by Canadian National Railway (CN) and Canadian Pacific Railway (CP) within Canada, including to and from ports and border crossings;
- identify problems and issues with respect to railway service, including those stemming from other elements of the logistics chain;
- determine if there were any problems with logistics for shippers located on shortlines and, if so, the source of the problem including service, operating, or marketing practices of the main-line carriers;
- identify best practices and how these could be expanded to address service issues; and
- make recommendations on how to address these problems and issues, including both commercial and, if necessary, regulatory solutions.

The review was focused on the railways but examined the full rail-based logistics system, including shippers, terminal operators, and ports since the performance of the system can be affected by any one of several stakeholders involved in the movement or handling of rail freight traffic.

The scope of the review was limited to service issues within the rail-based logistics chain.

### 1.2.1 THE PANEL'S TERMS OF REFERENCE

The Panel's terms of reference (Appendix C) describe the objectives and the approach to be followed.

#### *1.2.1.1 Objectives*

The Panel was required to develop recommendations to address problems and issues with respect to service within the rail-based logistics system. The recommendations could include both commercial and, if necessary, regulatory solutions. The recommendations were to be aimed at improving the efficiency, effectiveness and reliability of service within the system, facilitating economic growth and trade expansion, and improving accountability among stakeholders.

In undertaking its work, the Panel was guided by the terms of reference for the review as well as its own terms of reference. This Report is based on the results of the work completed under Phase I plus the Panel's consideration of stakeholder submissions, consultations, feedback on the Panel's Interim Report, and other relevant information.

#### *1.2.1.2 Approach*

In conducting its work, the Panel was directed to:

- meet with the Phase I consultants to review and discuss their findings;
- undertake site visits of the rail transportation logistics operations in both western and eastern Canada;
- solicit comments from interested parties on issues, solutions, best practices, and factors the Panel should consider in developing its recommendations;
- conduct bilateral meetings with stakeholders, as required;
- develop draft recommendations based on the Phase I consultant reports, stakeholder input and other relevant information;
- release an interim report containing the draft recommendations and solicit comments from interested parties;
- conduct bilateral meetings with stakeholders following the release of the Interim Report, as required;
- finalize a set of recommendations after considering comments submitted by interested parties and other relevant information; and
- submit its final report and recommendations to the Minister by end of 2010.

## 1.3 PANEL PROCESS

Shortly after being appointed in September 2009, the Panel held meetings with Transport Canada, the Canadian Transportation Agency (the Agency), CN and CP, and the Coalition of Rail Shippers (CRS)[2] to discuss the review objectives and process.

The Panel conducted site visits in November and early December to observe rail-based logistics operations, including the interfaces between various stakeholders. It also discussed the approach to the review and heard preliminary stakeholder views on issues. Site visits took place across Canada, and included trips to various shipper locations, port and terminal operations in Vancouver, Prince Rupert, Montreal and Halifax, and a number of railway yard operations.

The Panel also met with Phase I research consultants to discuss their work and findings. Meetings were held with CPCS Transcom Limited, QGI Consulting Ltd. and NRG Research Group.

On November 9, 2009, the Panel called for submissions from interested parties, to be filed by February 26, 2010 (Appendix D). In its call letter[3], the Panel requested stakeholders to:

---

[2] The Coalition of Rail Shippers represents a broad base of shipper associations. Many of the member associations attended the initial meeting with the Panel as well as subsequent meetings between the Panel and the CRS.

[3] Subsequently, the Panel notified stakeholders, in a letter dated January 28, 2010, that since not all of the Phase I research reports had been released at that point, it was extending the deadline for submissions to allow time for stakeholders to consider all of the reports. In a letter dated March 31, 2010, by which time all the Phase I reports had been released, the Panel fixed April 30, 2010, as the due date for submissions.

- articulate the nature and extent of service issues;
- describe the nature and extent of adverse impacts;
- propose concrete and realistic solutions that could be implemented in a practical manner;
- explain how the recommended solutions addressed the identified issues or problems;
- highlight best practices that might be adopted to improve service; and
- identify key principles or factors the Panel should consider in developing its recommendations to improve service in the rail-based logistics system in Canada.

In response to its call letter, the Panel received submissions from 141 stakeholders – including 35 that were not posted on the Panel's website[4] at the request of the stakeholder. (See Appendix E for a list of stakeholders providing published submissions.) Most of the submissions focused on issues and proposed solutions. The Panel met with many of the stakeholders to discuss their submissions. Since the Panel received a number of submissions from shipper associations it asked the associations how they involved their members in developing their submissions. The Panel is satisfied that the submissions from associations reflect the views of senior executives from their member organizations.

Appendix F lists the stakeholders with whom the Panel met during site visits and/or post-submission consultation sessions. In total, the Panel met with 85 stakeholders, including shippers, shipper organizations, ports, terminals, railways, shipping lines and others across the rail-based logistics chain.

The Panel prepared an Interim Report based on the Phase I research work, the written submissions, and comments it received during its consultations. The Panel released its Interim Report, including draft recommendations, on October 8, 2010. The draft recommendations were aimed at rebalancing commercial relationships between railways and non-railway stakeholders based on a commercial approach with a regulatory fallback. In its letter regarding the release of the Interim Report (Appendix G), the Panel gave stakeholders a one-month period to review the report and provide written comments on:

- the acceptability and in particular, the feasibility of the draft recommendations;
- specific improvements to the draft recommendations;
- the relative priority of the draft recommendations;
- the impact of the draft recommendations on stakeholders and on service within the system; and
- other possible solutions to service-related problems that might not have been reflected in the draft recommendations.

The Panel received 46 submissions from stakeholders on the Panel's Interim Report, including three that were not posted (See Appendix E).

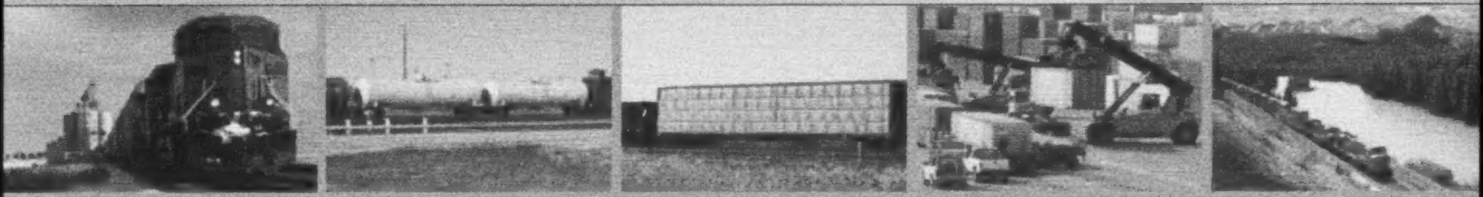
In its Interim Report, the Panel asked the railways to provide letters outlining their respective commitments to the Panel's commercial recommendations. (See Appendix H for the recommendations on the four key elements underlying the commercial approach). Consequently, the Panel met with both railways to discuss and clarify specific aspects of their commitments. The Panel also met with the CRS and many of its members to discuss the conclusions from a November 15, 2010 forum held by the CRS to prepare a response to the Panel's Interim Report.

The Panel has been supported by a small secretariat and has consulted legal counsel to discuss legal matters surrounding rail service issues.

---

[4] http://www.tc.gc.ca/eng/policy/acg-rfs-review-examen-sfm-rvw-eng-442.htm

# CHAPTER 2



## 2. CURRENT REGULATORY FRAMEWORK

The CTA is the framework for the economic regulation of railways in Canada and relies primarily on market forces to govern relationships between shippers and railways. Nonetheless, the CTA recognizes the market power of the railways, and contains a number of provisions designed to provide protection to shippers against the potential abuse of this market power by the railways. This chapter briefly describes the various "shipper protection" provisions[5] – in particular those that could potentially be used to address railway service issues.

### 2.1 TRANSPORTATION POLICY STATEMENT

Section 5 of the CTA contains the statement on the National Transportation Policy that guides the development of transportation policy. This policy statement was considered by the Panel in the development of its recommendations. The statement reads as follows:

*It is declared that a competitive, economic and efficient national transportation system that meets the highest practical safety and security standards and contributes to a sustainable environment and makes the best use of all modes of transportation at the lowest total cost is essential to serve the needs of its users, advance the well-being of Canadians and enable competitiveness and economic growth in both urban and rural areas throughout Canada. Those objectives are most likely to be achieved when:*

*(a) competition and market forces, both within and among the various modes of transportation, are the prime agents in providing viable and effective transportation services;*

*(b) regulation and strategic public intervention are used to achieve economic, safety, security, environmental or social outcomes that cannot be achieved satisfactorily by competition and market forces and do not unduly favour, or reduce the inherent advantages of, any particular mode of transportation;*

*(c) rates and conditions do not constitute an undue obstacle to the movement of traffic within Canada or to the export of goods from Canada;*

*(d) the transportation system is accessible without undue obstacle to the mobility of persons, including persons with disabilities; and*

*(e) governments and the private sector work together for an integrated transportation system.*

---

[5] More information is available on the Agency's website at http://www.otc-cta.gc.ca.

## 2.2 LEVEL OF SERVICE

In terms of addressing service issues, the main regulatory remedy is the level of service (LOS) provisions of the CTA. (See Appendix I.) These provisions[6] impose LOS obligations on railways, authorize the Agency to investigate complaints, and provide broad authority for the Agency to order corrective action, if warranted. The railways' obligations are, however, subject to a reasonableness test. In other words, a shipper's right to rail service is not absolute.

On receipt of a complaint from a shipper, the Agency may investigate and determine whether the railway is fulfilling its LOS obligations. If the Agency concludes that a carrier has not fulfilled its service obligations, the Agency has wide-ranging powers to order the railway to remedy the situation.

Any regulatory intervention by the Agency, however, must respect the terms of service, if any, established by a confidential contract. Furthermore, the Agency does not have the authority to order a railway to pay damages if the railway is found in breach of its service obligations. The shipper must seek damages through the courts.

In summary, under the LOS provisions in the CTA, a railway company is required, in accordance with its powers, to:

1. furnish adequate and suitable accommodation for receiving and unloading all traffic offered for carriage;
2. furnish adequate and suitable accommodation for carriage, unloading and delivery of traffic;
3. receive, carry and deliver traffic without delay and with due care and diligence;
4. furnish and use all proper appliances, accommodations and means necessary for those functions; and
5. furnish any other customary or usual service incidental to railway transportation. Traffic must be taken, carried and delivered upon payment of the lawfully payable rate.

A railway company must afford all persons adequate and suitable accommodation for receiving, carrying and delivering traffic on and from its railway, for the transfer of traffic between railways, and for the return of rolling stock. Furthermore, railway companies are required to afford to abutting or intersecting railways all reasonable facilities for delivering to or receiving from, or carrying by its railway without unreasonable delay, all traffic of that other railway.

Any person may file a complaint with the Agency about railway service. The Agency has up to 120 days to investigate the complaint and determine whether the railway is fulfilling its obligations.

### Agency powers

If the Agency finds that a railway company is not fulfilling its service obligations, it has extremely broad remedial powers. It may order that:

1. specific works be constructed or carried out;
2. property be acquired;
3. railway equipment be allotted or used as specified by the Agency; or
4. any specified steps, systems or methods be taken or followed by the railway.

The Agency may also specify maximum charges that may be made by the company, pursuant to an Agency Order, and order that the company fulfill the obligation in any manner and within any time or during any period that the Agency deems expedient.

---

[6] Sections 113 to 116 of the *Canada Transportation Act*. A full copy of the Act can be found at http://laws.justice.gc.ca/en/C-10.4/.

> *"The* Canada Transportation Act *states that the railways must provide 'adequate and suitable accommodation' of traffic. The vagueness of this definition makes it difficult for either side to prove or defend their case in a Level of Service complaint. As a result, this complaint process tends to be long and drawn-out, and requires extensive time and money to follow it through to completion as the parties must prove their case in the context of this loose definition of service. The investment required in launching a Level of Service complaint is a significant deterrent for many shippers to utilize this tool provided in the Act."*
>
> **April 30, 2010, Canadian Canola Growers Association's submission to the Panel, pages 1-2.**

## 2.3 COMPETITIVE ACCESS PROVISIONS

There are two competitive access provisions aimed at encouraging rail competition for captive shippers, for the long haul portion of the movement. These provisions authorize the Agency to set rates for captive shippers for the movement of traffic to an interchange point, which is a point served by both CN and CP with a physical connection that allows traffic to be transferred from one railway to the other.

To the extent that railways use these provisions to compete for traffic, shippers should benefit from better service.

### Interswitching

The interswitching provisions apply to movements from a point of origin within a radius of 30 kilometres of an interchange point. The Agency prescribes the interswitching rate, which is based on railway costs and is paid to the originating carrier for the movement to the interchange point, from which point the connecting carrier completes the movement of the traffic. The Agency establishes an interswitching rate scale that applies to all eligible movements. The Agency reviews the regulations at least every five years.

### Competitive line rates

The competitive line rate (CLR) provisions[7] apply to movements to an interchange point that are greater than 30 kilometres. The CLR rates, established by the Agency, are based on a formula that includes the interswitching rate for the first 30 kilometres plus an amount for the balance of the distance based on the originating carrier's average revenue per tonne-kilometre for moving similar traffic over a similar distance.

There are two main differences between interswitching rates and CLRs:

- Unlike interswitching rates, which are prescribed in advance by the Agency and apply to all eligible movements, CLRs are calculated on a case-by-case basis. This creates uncertainty for the shipper and the "connecting" carrier, which may be trying to assess the costs and benefits of entering into a contract based on a CLR rate.
- Before a shipper can apply to the Agency for a CLR to the interchange point, the shipper must have an agreement with the "connecting" railway for the movement from the interchange point to destination.

---

[7] Sections 129-136 of the *Canada Transportation Act.*

## 2.4 FINAL OFFER ARBITRATION

Final offer arbitration (FOA) is a process for resolving disputes between railways and a shipper (or, since 2008, a group of shippers) over rates or "with any of the conditions associated with the movement of goods" in other words, service. It is triggered by an application from the shipper(s) to the Agency. (The FOA provisions of the CTA are attached as Appendix J.)

A carrier must receive written notice of a shipper's intention to submit a matter to the Agency for FOA at least five days prior to the shipper doing so. A shipper's submission for FOA must include the final offer of the shipper to the carrier, excluding any dollar amounts.

Within 10 days of submitting the issue to the Agency, the shipper and the carrier make their final offers, including the proposed rates.

An independent arbitrator receives and evaluates the offers made by the shipper and the carrier and must select one of the offers. The arbitrator is not allowed to amend the offers or to put forward his or her "compromise" offer. The arbitrator's decision is binding on the parties.

Unless the parties agree to a different time frame, arbitration must be completed within 60 days, or 30 days for disputes involving freight charges of less than $750,000. The arbitrator's decision remains in effect for a period of up to one year, provided the parties did not previously agree on a shorter period.

*Several stakeholders indicated to the Panel that shippers use FOA primarily for rates. They say that introducing service conditions significantly complicates the process, and shippers do not want to risk losing the rate issue based on a service complication. The Panel believes the requirement for the shipper to submit its final offer in advance of the railway's final offer is a disincentive to use the FOA provisions for disputes that are limited to or focused on service.*

## 2.5 ANCILLARY CHARGES

In addition to freight rates for moving cars, railways also apply charges for activities incidental to the movement of traffic and for other services they provide to customers. These are referred to as incidental, optional or ancillary charges. Examples include charges for demurrage, cleaning cars, storing cars and weighing product.

Railway ancillary charges have become an issue for shippers in recent years. The railways have increased charges and revised their associated conditions to encourage efficiencies and reduce costs. Shippers often find that these charges are not fair and do not reflect "balanced accountability" in that there are no comparable reciprocal penalties for poor railway performance.

*The CTA was amended in 2008 to permit the Agency, upon complaint by a shipper or group of shippers, to investigate charges and conditions contained in a tariff and that are of general application (Section 120.1). The Agency may establish new charges or terms and conditions if it finds those in the tariff to be unreasonable. This provision is intended to give shippers leverage to challenge railway ancillary charges or conditions considered to be unfair.*

A copy of this new provision is attached as Appendix K.

## 2.6 RUNNING RIGHTS

Running rights enable a railway to run over the tracks of a second railway. For example, most of VIA Rail's trains run over track owned by CN and CP under separate agreements. VIA pays an access fee for the use of the tracks. In addition, CN and CP have a number of commercial running rights agreements under which the two railways have negotiated the terms and conditions of access.

Railways cannot always negotiate commercial running rights agreements. The CTA provisions permit any federally regulated railway (including railways based in the United States) to apply to the Agency for "regulated" running rights.

The regulated running rights provisions are not currently used because of two Agency decisions in the early 2000s that placed restrictions on their application. In May 2001, the Agency decided it did not have the authority to grant running rights that included traffic solicitation. In a subsequent decision dated September 10, 2002 the Agency determined that a statutory running right is an "exceptional remedy" that can be granted only if there is evidence of market abuse or market failure.

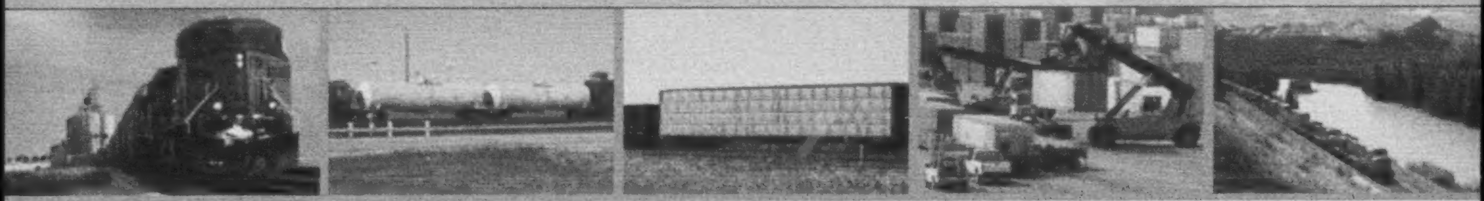
## 2.7 COMMERCIAL MECHANISMS

Confidential contracts are commercial mechanisms to address service and/or rate issues under which both parties must agree to the terms and conditions. Other potential commercial mechanisms include commercial mediation and arbitration. Commercial dispute resolution solutions are often quicker and less expensive than the remedies available under the CTA.

While commercial contracts are common (CP reported in its submission that 75 percent of its business is covered in confidential contracts), a large number of shippers indicated that they do not have the leverage to negotiate effective service conditions. They also point to inclusion by reference provisions for ancillary/optional service charges that allow railways to unilaterally add or increase charges within established contracts.

In 2006, the Minister of Transport wrote to CN and CP to encourage the railways to work with shipper representatives on a package of commercial solutions to rail service issues. This eventually led to negotiations on a commercial dispute resolution (CDR) process. While some progress was made, consultations eventually broke down, in large part because there was no agreement on whether or not to include the United States portion of movements in the proposed CDR process.

# CHAPTER 3



## 3. SUMMARY OF PHASE I RESEARCH

The research phase of the Rail Freight Service Review consisted of quantitative and analytical studies which became an important source of reference material for the Panel and others. The Panel organized its work program to ensure that all of the research reports were available to stakeholders before they had to file their submissions.

Transport Canada contracted with three consulting firms, which produced six separate reports and five technical appendices that were published on the Rail Freight Service Review website (Appendix L). The reports and key findings are briefly summarized in this chapter.

The six reports include:

- a quantitative analysis of railway fulfillment of shipper demand and transit times;
- a description of Canada's rail-based freight logistics system;
- an analysis of railway operating practices;
- a shipper survey;
- a survey of terminals, ports and shipping lines; and
- an assessment of how service issues are addressed in other transportation sectors in both Canada and the United States and in other regulated network industries.

### 3.1 ANALYSIS OF RAILWAY FULFILLMENT OF SHIPPER DEMAND AND TRANSIT TIMES

The report entitled *Analysis of Railway Fulfillment of Shipper Demand and Transit Times*, prepared by QGI Consulting, is a quantitative assessment of the extent to which railways meet shipper demand for service. It includes an assessment of railways' fulfillment of shipper demand (car supply) plus an analysis of the railways' transit time performance. The report examines railway service across various factors such as commodity, shipper size, size of order, length of haul and access to alternate transportation. Railways provided the consultant with sample data from October 1, 2006 to September 30, 2008, the two-year study period for Phase I of the review.

The report's **demand fulfillment** section analyzes the railways' performance in supplying empty cars primarily for merchandise and grain customers. The analysis compares the actual number of cars "spotted" at shipper locations to:

1. railway long-term forecasts;
2. shipper car orders; and
3. railway short-term car supply commitments to merchandise shippers.

In the Panel's view, key findings from the QGI demand fulfillment analysis are as follows:

1. Comparison to railway long-term forecasts.
   - When averaged over the entire two-year study period, the railways' forecasting processes were accurate in estimating traffic volumes within 10 percent, based on the performance of both CN and CP.
   - However, there was significant variance to forecasts when they were analyzed over shorter time periods. For example, on a monthly basis at a commodity subgroup level, the average variance to forecast was 36 percent for the two railways over the study period.
2. Comparison to shipper car orders. (Only grain and merchandise shippers for whom the railways provide rail cars were analyzed.)
   - During the entire two-year study period, CN provided 98 percent of net grain cars ordered and CP 97 percent. For merchandise, CN provided 86 percent of car orders and CP fulfilled 73 percent during the same two-year period.
   - On a week-to-week basis, each railway provided grain shippers with at least 90 percent of cars ordered only 54 percent of the time. CN performance was 57 percent and CP performance was 51 percent.
   - Railway performance in meeting shipper demand on a weekly basis for merchandise traffic differed between the railways. CN provided at least 90 percent of the cars ordered only 68 percent of the time, while the figure for CP was 50 percent.
3. Comparison to short-term car supply commitments to merchandise shippers. (This was limited to CN shippers, as CP does not make car supply commitments to these shippers.)
   - On a weekly basis, CN provided at least 90 percent of the merchandise cars guaranteed under its Guaranteed Car Order Program 81 percent of the time.

Most of the QGI analysis was provided at the weekly level, with some very limited analysis at a daily level due to railway concerns that the complexity of daily data would lead to serious problems in conducting an objective and fair analysis. Trends in QGI's analysis indicate that if it had been possible to conduct a more rigorous analysis at the daily level, the results would have been even poorer.

The **transit times** analysis section measures (1) the time it takes loaded cars to move from origin to destination and (2) the consistency of transit times.

Transit times are a measure of system service quality, and the consistency in transit times reflects the reliability of rail service, which itself impacts logistics planning.

With respect to QGI's transit times analysis, there was considerable variability in individual shippers' transit times on a week-to-week basis.

In addition, service levels differed significantly across the movements of the three main groups of traffic examined (bulk/grain, carload and intermodal). Among these groups, intermodal traffic had the lowest and most consistent transit times, likely reflecting both its terminal-to-terminal nature and the railways' priorities attached to this traffic. Table 1 summarizes transit times by railway and by major commodity group.

## Table 1: Transit Time Comparisons by Railway and Major Commodity Group

| | Bulk/Grain | | Carload | | Intermodal | |
|---|---|---|---|---|---|---|
| | CN | CP | CN | CP | CN | CP |
| Average length of haul (miles) | 1030 | 877 | 1078 | 754 | 1635 | 1739 |
| Average transit times (hours)<br>Minimum and maximum range of transit times (75 percent of car trips) | 101<br>73-130 | 106<br>69-142 | 117<br>76-159 | 140<br>85-194 | 68<br>54-83 | 83<br>64-102 |
| Average CV ( percent)[8] | 24.6 | 29.9 | 30.7 | 33.9 | 18.5 | 19.9 |

**Note:** *CV = coefficient of variation is a statistical measure of consistency in transit times.*

**Source:** *Analysis of Railway Fulfillment of Shipper Demand and Transit Times*, QGI Consulting, March 2010.

For example, using the data from Table 1, a typical CP bulk or grain customer shipping rail cars a distance of 877 miles from a single origin to a single destination might expect their shipments to take anywhere from 69 to 142 hours (three to six days), 75 percent of the time. For the remaining 25 percent of the time, shipments will fall outside this range of transit times.

Generally, there was little differentiation in transit times, when analyzed for a number of characteristics such as shipper size, flow size, access to competition, core versus non-core railway origins and shortlines versus CN and CP origins. However, the variability in transit times can be a problem in logistics planning for all stakeholders and can contribute to congestion.

An example is the analysis of competitive versus non-competitive origins. Using railway-supplied data, QGI developed a methodology[9] to determine and assess the direct rail competitive status of all origin locations in the study data. QGI's analysis determined that, for CN, 51 percent of the traffic (excluding intermodal) originated at non-competitive origins. For CP, 84 percent of the traffic (excluding intermodal) originated at non-competitive origins.

Comparisons of transit time variability between competitive and non-competitive origins for both railways showed that while shippers at competitive points might be expected to receive better service, they do not have an advantage in transit time consistency when examined at an aggregate level for all major commodity groups (excluding intermodal) for all origins. QGI noted, however, that this aggregate view masks some important differences across commodities and regions. CN grain traffic from Alberta and Saskatchewan and merchandise traffic from Saskatchewan and British Columbia had more consistent performance from competitive than from non-competitive origins[10].

---

[8] See pages 16 and 17 of the QGI report for an explanation of the measurement framework. For example, if transit time was 100 hours and the standard deviation was 20 hours, the coefficient of variation would be 20 percent. A lower coefficient of variation reflects a more consistent transit time.

[9] See pages 99-100 and 113- 114, in QGI's *Analysis of Railway Fulfillment of Shipper Demand and Transit Times*, March 2010.

[10] See table at bottom of page 100 in QGI's *Analysis of Railway Fulfillment of Shipper Demand and Transit Times*, March 2010.

QGI's other key findings for transit times are as follows:

- As expected, there was a significant deterioration of transit time performance during the winter months for both railways.
- At final destination, the average time to place loaded cars by the railways at receivers' sidings ranged from 10 hours for bulk traffic to over 40 hours for merchandize freight. Bulk traffic, particularly unit trains, often run through railway yards for direct delivery to destination terminals, while merchandise trains usually are received and sorted at railway yards prior to delivery of specific cars to receivers by local switch assignments. This different handling may explain much of the difference in placement time.
- Traffic arriving at destination towards the end of the week (Friday and Saturday) took 23 percent longer to be placed than traffic arriving all other days of the week. QGI notes that "it is highly likely that the majority of these delays are due to the railways needing to stage traffic on their own lines awaiting the opening of receiver facilities that do not accept railcars on weekends."
- Regarding cars released in blocks at origin by shippers, 42 percent of CN's and 38 percent of CP's cars did not arrive in a single block. The splitting of car blocks can cause logistical planning problems for shipper/receivers, especially if they are unplanned or occur without notice.
- Shipper and receiver loading and unloading times varied widely. Coal and grain had the lowest and most consistent loading and unloading times amongst bulk products. In merchandise, metal products, ores and concentrates had the highest transit times and most variable performance at origin and destination.

## 3.2 DESCRIPTION OF CANADA'S RAIL-BASED FREIGHT LOGISTICS SYSTEM

QGI Consulting prepared a report entitled *Canada's Rail-Based Freight Logistics System*. It provides a profile of CN's and CP's rail systems and operations within a rail freight logistics setting. This includes a description of carload, intermodal and unit train services provided by railways to shippers. In terms of rail freight logistics, the report outlines key processes used to plan and provide rail service including: train planning and design; locomotive and car equipment; rail car order and distribution; shipment transaction processes; terminals; infrastructure; traffic control and interchanges.

The report describes the physical infrastructure and operational processes involved in planning and moving freight on railway networks and the relationships between railways and their customers in the efficient operation of the Canadian freight rail logistics system. The report notes that the interdependencies among railways, shippers and receivers require effective communication processes and collaboration.

The report describes critical interface activities at origin, in transit and at destination and the impacts that could result from system failures. At origin, problems mainly revolve around delivery of the right number of cars on a timely basis. While cars are in transit to destination, it is important for railways to communicate the estimated time of arrival (ETA) to receivers so they can plan receipt of the shipments. At destination, railways need to work closely with terminals to coordinate delivery and placement of cars to ensure effective use of railway equipment and terminal facilities, avoid congestion and provide for effective and efficient port throughput.

## 3.3 ANALYSIS OF OPERATING PRACTICES

QGI Consulting prepared a report entitled *Analysis of Operating Practices* describing key operating issues, identified through a series of stakeholder interviews, that adversely impact service, system efficiencies and capacity. The consultant proposed solutions based on the following pre-determined set of best practice supply chain characteristics that were used for the interview framework with stakeholders:

- mechanisms to communicate demand and capacity for planning operations;
- processes and communications to support day-to-day operations; and
- optimization of output at the most profitable level.

The issues identified and solutions proposed are summarized in Table 2:

**Table 2: Summary of Key Operational Issues from Stakeholder Interviews and QGI's Recommendations to Address Issues**

| KEY OPERATIONAL ISSUE | QGI's RECOMMENDATIONS |
|---|---|
| 1. **Balanced accountability:** Each supply chain partner should be responsible for the costs that its behaviour imposes on the system. | • The Agency should develop a set of rail service conditions to support balanced accountability.<br>• Transport Canada should measure rail system logistics performance. |
| 2. **Operational cooperation and communications:** Railways should do a better job of communicating the status of rail traffic and the ETA for local pick-up and delivery. | • CN and CP should measure their ETA accuracy so that both railways and customers can have a clearer picture of the accuracy of this important measure.<br>• Interchange service agreements with shortlines should be subject to performance measurement.<br>• CN and CP should measure performance of local switching services against planned day and switch windows for local service.<br>• Railways should review and improve their ETA communication processes of loaded and empty cars/trains. |
| 3. **Customer service:** Railways need improved processes for logging, escalating, responding to and resolving customer complaints. | • Transport Canada should institute an on-going railway stakeholder satisfaction survey.<br>• CN should review how it responds to customer service complaints to improve its effectiveness in responding to customer service issues. |
| 4. **Ancillary charges:** Railways need to improve administrative effectiveness and ensure fairness in calculating allowable free time for demurrage. | • Railways should implement processes to improve accuracy of demurrage administration.<br>• Railways should consider revising demurrage systems to allow for more equitable calculation of free time to load empty cars. |

**Source:** QGI Consulting, *Analysis of Operating Practices*, October 2009.

## 3.4 SURVEY OF SHIPPERS

NRG Research Group, in collaboration with the University of Manitoba Transport Institute, conducted a statistically representative survey of 262 shippers from across Canada during August-September 2009 through a combination of telephone calls and face-to-face interviews. The objective of the survey was to examine shipper satisfaction with the overall performance of the rail freight logistics system and to identify areas where service could be improved.

The overall results showed that shippers did not have a high level of satisfaction with service provided by CN and CP. Only 17 percent of the respondents rated their satisfaction as a six or seven, based on a one-to-seven scale, with seven being very satisfied. Approximately 35 percent of shippers gave a rating of three or lower, while 45 percent of shippers indicated their satisfaction levels had decreased over the past three years. In terms of financial impact, 62 percent of shippers reported that they suffered financial consequences as a result of poor performance.

> *"It should be noted that customer satisfaction research usually encounters much higher top box frequencies in the range of 50% to 70%."*
>
> **NRG Research Group,** *Survey of Shippers*, **November 2009, page 3.**

Most of the shipper dissatisfaction was linked to problems associated with:

1. reliability of car supply;
2. on-time delivery of cars at origin and destination;
3. timely pick-up of empty cars after unloading;
4. consistent transit times; and
5. responsiveness of railways to resolving operational problems.

As shown in Table 3, shippers served by multiple railways (43 percent of the survey population) have higher satisfaction levels than those served by one railway or with limited shipping alternatives. Approximately 23 percent of shippers with multiple rail options rate their service as very good. In contrast 14 percent of shippers with access to one railway with viable options (29 percent of respondents) rated their service as very good. For the remaining 28 percent of shippers served by one railway with limited or no transportation alternatives, only 11 percent reported being very satisfied with rail service.

Shippers in the survey were asked to provide suggestions for railways and other stakeholders that would improve customer satisfaction. For railways, suggestions included: improved communications by providing more knowledgeable customer service representatives; greater consistency in transit times; and more rail cars to reflect demand. Approximately three-quarters of the shippers indicated that railways could improve the overall logistics system by increasing their infrastructure investments and hiring additional railway crews particularly for car switching. The shipper survey respondents indicated railways could provide better service if non-railway stakeholders expanded loading and unloading capacity, improved their infrastructure and provided better forecasts of their shipping needs.

**Table 3: Comparison of Shippers' Satisfaction with Rail Service to Shipping Alternatives**

| SHIPPING ALTERNATIVES | Percent of respondents | Percent being very satisfied with rail service[1] |
|---|---|---|
| Access to more than one railway and having transportation alternatives | 43 | 23 |
| **Served by one railway** | | |
| – With transportation options | 29 | 14 |
| – With limited or no transportation alternatives | 28 | 11 |

[1] A rating by shippers of 6 or 7 on a 7-point rating scale.

**Source:** *Survey of Shippers*, NRG Research Group, November 2009.

## 3.5 SURVEY OF OTHER STAKEHOLDERS: TERMINAL OPERATORS, PORTS AND SHIPPING LINES

The survey of terminal operators, ports and shipping lines complemented the shipper survey by capturing views on similar rail service issues. This face-to-face survey was also conducted by NRG Research Group in collaboration with the University of Manitoba Transport Institute and involved a series of surveys and discussion guides. Senior staff members from 14 terminals, eight port authorities and six shipping lines operating in Canada were interviewed.

Satisfaction with rail service varies widely across and within these stakeholder groups. Terminal operators expressed some of the strongest opinions, both positive and negative, about their satisfaction with rail service. The terminal group rated rail service in the three-to-five range (on a scale of one to seven, with seven being very satisfied). Port Authorities were the most satisfied group rating rail service from four to six. Of the six shipping lines interviewed, half were satisfied (rating of six) with the remainder giving scores of three or four.

*Terminals reported that inconsistent rail service creates operational difficulties. Port authorities reported that poor cooperation between railways and other stakeholders, limits system efficiencies. All groups indicate there are no effective means to hold the railways to account when poor service results in adverse financial impacts for non-railway stakeholders.*

Generally, this stakeholder group would like more timely delivery of the correct number of cars and better access to knowledgeable and helpful customer service representatives. They also suggest the need for more communications and transparency, including accurate and reliable information about railway operations, formal operating agreements with railways, and improved working relationships in a logistics system.

Other suggestions include the establishment of dedicated rail corridors to ports, particularly one in Vancouver similar to California's Alameda Rail Corridor; port-controlled railways to coordinate rail movements to and from ports; and an inland intermodal facility near the Greater Vancouver Area to alleviate congestion.

## 3.6 SERVICE ISSUES IN REGULATED INDUSTRIES OTHER THAN CANADIAN RAIL FREIGHT INDUSTRY

The report entitled *Service Issues in Regulated Industries Other than Canadian Freight Industry*, prepared by CPCS Transcom Limited, is based on a literature review supplemented by consultations with government officials in Canada and the United States, regulatory agencies, railways and stakeholder associations. The objectives of the research were to:

- describe the current LOS obligations contained in the *Canada Transportation Act* (sections 113-115) and how complaints about rail freight service are addressed in Canada (section 116);
- describe similar level of service obligations, if any, in the United States for rail carriers, Canadian air, water and pipeline (oil and gas) carriers and other regulated service providers in Canada, including hydro, cable and satellite television and telephone companies; and
- assess whether service level obligations and remedies in other industries may be usefully applied to Canadian railways.

The terms of reference for the study did not require an examination of the effectiveness of the current LOS obligations, nor did the study look at whether they were sufficient to ensure Canadian federal railways provide adequate and reasonable rail service.

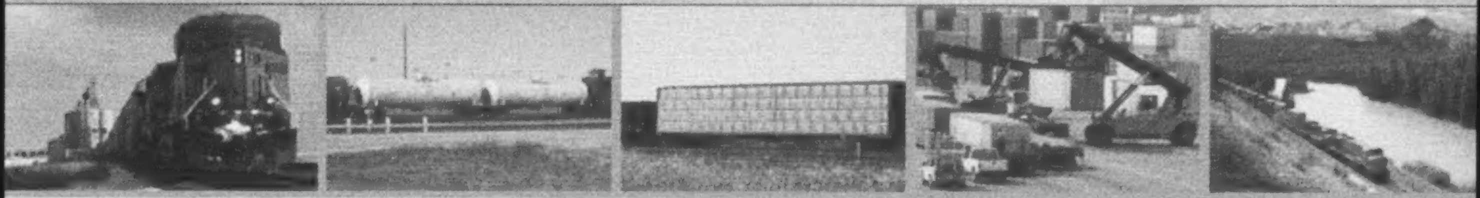
In addition to the regulatory focus, the consultant discusses several commercial mechanisms used elsewhere to address service issues in rail freight.

The research compares level-of-service regimes in both Canada and the United States. In both instances, statutory provisions are in place to provide for formal filing of complaints with regulatory agencies and regulatory provisions for pursuing issues through mediation and arbitration. In Canada, shippers have access to regulated final offer arbitration, while in the United States, the mechanisms include an informal complaint process administered by the Surface Transportation Board.

Confidential contracts are permitted in both countries. In the United States, the Surface Transportation Board can exempt commodities from regulation if it believes it serves a public interest – that is to say, if the transportation market for certain commodities and types of traffic is sufficiently competitive that regulatory oversight is not necessary. Shippers exempt from regulation also have access to the Board's informal complaint process. In the United States, the National Grain and Feed Association has a unique arbitration agreement with the railway industry. In Canada, CN and CP have commercial dispute resolution processes available to their customers.

The consultant's main observation was that none of the regulatory regimes examined in Canada and the United States was found to be clearly superior to the regime of regulating level of service for Canadian freight services.

# CHAPTER 4



## 4. KEY ISSUES AND SOLUTIONS IDENTIFIED BY STAKEHOLDERS

In this chapter, the Panel identifies and discusses key issues, impacts and proposed solutions raised by stakeholders that fall within its mandate. The first part of this chapter deals with key issues and solutions raised by non-railway stakeholders[11] and the railways in response to the initial call letter and in face-to-face consultations prior to the release of the Panel's Interim Report on October 8, 2010. The second part deals with the major issues and solutions raised by all stakeholders in response to the Interim Report.

Other issues, including those the Panel considered outside its mandate, are addressed in Chapter 7.

### 4.1 STAKEHOLDER COMMENTARY PRIOR TO THE INTERIM REPORT

The Panel received submissions from 141 stakeholders in response to its initial call for submissions on November 9, 2009. A breakdown of the submissions by stakeholder group is provided in Table 4.

**Table 4: Stakeholders Providing Submissions in Response to the November 9, 2009 Call Letter**

| Stakeholder Group | Number of Stakeholders |
|---|---|
| Railways (Class I and shortlines) | 4 |
| Shippers | 50 |
| Associations and organizations | 33 |
| Terminals, ports and transloaders | 18 |
| Shipping lines | 2 |
| Governments (provincial and municipal) | 29 |
| Others | 5 |
| **Total** | **141** |

The Panel also held face-to-face consultation meetings with 85 stakeholders from various sectors in Canada, including CN and CP, 30 rail shippers, 16 terminals/transloaders/ports, 15 shipping lines and 18 associations/organizations. As a result, the Panel was presented with a wide variety of issues and proposed solutions. Most of the issues raised clearly fell within the Panel's terms of reference, but some did not.

---

[11] These include shippers, terminals, transloaders, shortlines, ports, associations and governments that provided submissions.

### 4.1.1 KEY ISSUES IDENTIFIED BY NON-RAILWAY STAKEHOLDERS

The Panel has grouped key issues raised by non-railway stakeholders into the following categories:

- Competition/ railway market power;
- Railway resource levels;
- Railway service;
- Railway customer service (communications); and
- Sustainability.

#### 4.1.1.1 *Competition/ Railway Market Power*

Non-railway stakeholders argue that the rail freight industry in Canada is not a normally functioning competitive market, and that this often results in a significant imbalance in negotiating power between non-railway stakeholders and the railways. Furthermore, non-railway stakeholders believe the current shipper protection provisions in the CTA are insufficient to address service issues.

Stakeholders note that competition is lacking and, as a result, railways have:

- unilaterally imposed rate increases and/or new charges such as increasing freight rates beyond the rate of inflation during the recent economic slowdown;
- imposed fuel rate surcharges beyond fuel cost increases; and
- increased or implemented ancillary charges, often for services that were previously covered in the freight rate such as charges for temporary storage, movement of private cars and excessive rate surcharges for products shipped in tank cars.

With respect to rail service, shippers note that:

- service is often poor. For example, railways often fail to meet shipper demand on a timely basis;
- railways change switching service without notice;
- shippers have to adjust their operations to meet railway requirements, rather than vice-versa;
- shippers using private fleets have had to increase fleet sizes because of deterioration in railway car cycle times;
- railways are not subject to the consequences of poor service;
- the negotiation structure is not balanced; and
- rail and shipper records do not correspond, which leads to disputes over charges.

Shippers argue that if there were meaningful competition, railways would adjust their operations to meet customer demand, or at least negotiate service conditions to the mutual benefit of both parties. For these reasons, many shippers and other non-railway stakeholders are calling for more regulations to adjust the competitive balance between railways and their customers.

> *"Rail freight is not a normally functioning competitive market and this is the fundamental issue underlying all the price and service problems encountered by rail shippers."*
>
> **April 28, 2010, Canadian Industrial Transportation Association's submission to the Panel, page 16.**

**Summary of impacts:**

Railway market power and the lack of competition contribute to other major issues, such as inadequate resource levels, poor service and poor customer service/communications.

### 4.1.1.2 Railway Resource Levels

Railways are responsible for the critical task of determining the level of resources available to respond to shipper demand. This includes annual decisions and updates on resource planning to establish a "base" level of resources to move traffic: equipment, locomotives, crews and support staff. The base resource levels must take into consideration the need for contingency capacity to address short-term market surges and seasonal traffic, and to facilitate recovery from main-line disruptions. Unanticipated shipper volumes and poor planning by all parties can place extreme pressures on a railway system, especially when there are resource shortages. In addition to planning for base resource levels, railways also make short-term decisions on when to remove and re-deploy resources, such as when to store cars.

Railway decisions are based on commercial considerations. Some shippers believe there is a financial incentive for the railways to under-supply resources. This does not mean that all shippers expect the railways to respond to 100 percent of short-term demand at all times, since this could mean that significant volumes of railway assets would sit idle during off-peak periods. Nonetheless, shippers believe that the railways' resource levels are lower than they would be if normal functioning markets existed.

**Summary of impacts:**

Inadequate resource levels can lead to poor service and a breakdown in communications (poor railway response to shipper concerns), the cost of which is often borne by the shipper.

> *"The railways have a natural incentive to keep car supply to their level of optimal utilization (minimum cost, maximum revenue). With the relative inelastic nature of car supply and the variable nature of demand for railcars (a function of the variable demand and highly competitive environment of world commodity markets) the railways currently pass on the risk of car supply beyond a minimal level onto shippers. Historically, the level of this car supply tended to be at only a portion of the shipper demand, given*
>
> *(a) the lack of competitive alternatives available to shippers,*
>
> *(b) the consequential reality that the railways will get the business sooner or later,*
>
> *(c) the accountability the railways have to shareholders to keep costs down and profits up in a system unencumbered by balanced legislation or effective competition, and*
>
> *(d) because they can – there are no effective legal or financial consequences."*
>
> **April 30, 2010, Western Grain Elevator Association's submission to the Panel, page 3.**

### *4.1.1.3 Railway Service*

Shippers indicated that railway market power and resource levels ultimately lead to problems with railway service. Stakeholders identified a wide variety of service issues – mostly related to consistency, reliability and lost opportunity.

#### First mile / last mile

Throughout the review process, the most frequently raised concerns from shippers and other non-railway stakeholders were related to origin and destination activities, often referred to as "first mile / last mile" issues.

Examples of first mile issues include:

- poor order fulfillment – failure to spot the right number of cars at the right time in which shippers complain that not only do railways fail to supply the number of cars that shippers request, the railways fail to spot the number of cars they have committed;
- frequency of service that is inadequate or inconsistent;
- inappropriate or missed switch windows;
- failure to provide timely and accurate updates to ETAs, which limits the ability to mitigate adverse impacts from delays in train arrivals;
- equipment that is in poor condition or not the right type; and
- failure to pick up loaded cars on a timely basis.

Last mile issues include:

- failing to deliver cars on a timely basis;
- presenting the cars out of sequence;
- splitting cars that were loaded for delivery in blocks;
- failing to provide timely and accurate updates to ETAs (required to mitigate adverse impacts from delays in train arrivals); and
- failing to pick up empty cars on a timely basis.

Car movements between first mile and last mile are also an issue. Inconsistent transit times make it difficult for shippers to plan logistics, especially labour, and may require additional trackage or storage capacity at origin or destination locations.

**Summary of impacts:**

> Poor service can have broad impacts, including lost sales, discounted pricing, ocean vessel demurrage, sales contract penalties, idle/underutilized labour and equipment, increased operational costs, additional capital costs for on-site sidings/storage requirements, and inefficiencies from reduced system fluidity.

#### Intermodal issues

Canada's intermodal system is part of a very competitive global supply chain. Canadian ports and corridors compete with United States ports and corridors for traffic. Shipping lines can shift traffic volumes between ports of call based on relative changes in logistics costs or service. Canadian ports have been quite competitive in retaining and growing their share of domestic import and export traffic. It is essential that all players in the supply chain provide efficient and reliable services to preserve domestic inbound and outbound traffic and to grow other North American business.

While shipping lines, terminals and transload operators had similar first mile/last mile issues as discussed above, they also raised additional issues.

In order to optimize asset utilization, the railways prefer an even flow of intermodal cars to and from terminals. Shipping lines note that the import business does not operate at a constant level, with the result being that the flow of import containers is not compatible with the railways' balanced operating model. Shipping line representatives have told the Panel the railway model needs to adapt to the import business to better match car supply with cargo demand, including the need for the timely return of empty containers to port for subsequent delivery by shipping lines to offshore originating customers. In addition, variability in vessel arrivals, due mainly to ocean weather conditions, creates issues with car supply. This is compounded if vessels end up arriving in bunches. The railways' pursuit of "balance" is the root of the issue and one of the factors affecting container dwell times, a key metric for the railway/terminal/vessel interface at port.

Stakeholders also identified several issues with inland terminal operations. Exporters from inland locations can either source-load (load containers at origin) or transload containers—ship product to a transload facility near the port and have the transload facility stuff and deliver containers to intermodal container terminals.

Source loading issues include:

- lack of available empty containers (particularly in Saskatchewan, Manitoba and the northern parts of Alberta and British Columbia);
- challenges in re-positioning empty containers from surplus locations (eastern Canada, for example) to where needed (in the Prairies, for example);
- the railways' practice of no longer storing empty containers at inland terminals shifts costs to ocean carriers for storing containers off-site and increases costs to shippers for additional drayage; and
- reduction in the hours of operation for inland terminals, which affects the number of daily truck hauls a shipper can make to deliver loaded containers.

**Summary of impacts:**

All three stakeholder groups – shipping lines, terminals and railways – can adversely affect dwell times which, in turn, can affect the competitiveness of the container business in Canada. Lack of access to containers in a timely manner also creates major problems for shippers. Issues related to source loading adversely affect the ability of some shippers to compete in certain markets. However, the Panel is convinced the source loading issue is a market-based problem and is not attributable directly to systemic problems within the rail-based logistics system.

#### *4.1.1.4 Railway Customer Service (Communications)*

Most non-railway stakeholders raised issues related to customer service and, in particular, communications. Issues include: lack of notice regarding service changes; lack of notice in changes in ETAs; unfair application of demurrage charges and inaccurate billing; and generally poor responsiveness to customer complaints. Non-railway stakeholders claim the railways, especially CN, need to significantly improve their communications with shippers and other stakeholders. The railways have acknowledged this point, in particular CP with respect to small shippers.

> *"For both railways, many customers were frustrated with the railways' failure to provide feedback on the railways' available capacity and capability with respect to rail car supply, bulk train capacity, intermodal slot and train capacity and overall network capacity."*
>
> **QGI Consulting,** *Analysis of Operating Practices,* **October 2009, page 10.**

### Service changes

The railways' failure to provide notice and consult with shippers and receivers on significant service changes, such as changes in switching service, is a major issue for shippers and other non-railway stakeholders. These arbitrary changes by the railways ultimately affect the operations of non-railway stakeholders with consequential financial implications. Examples provided included the lack of consultation and notice when CN suspended rail service to container terminals in Vancouver and when CN provided no notification of late and missed switches in the North Vancouver area. Concern was also raised with the Panel regarding the lack of communication when CN reduced intermodal service to Halifax from two trains per day to one.

### ETAs

Shippers and receivers generally plan operations and crews around the expected arrival of trains/cars. This can be based on usual railway service, or on ETAs provided by the railway. In either case, unexpected changes in service delivery frequently occur for a number of reasons, many of which are beyond control of the railway. Many non-railway stakeholders complained that the railways too often do not provide notice when the planned delivery is delayed. If the stakeholder had received sufficient notice, remedial action could have been taken, in most instances, to mitigate the impact of the service failure. This might include rescheduling crews, working other business, or making alternate transportation arrangements.

### Demurrage, ancillary charges and inaccurate billing

CN's demurrage charges were a lightning rod for many shipper complaints early in the Panel's process. Demurrage charges are set out in railway tariffs that govern the use of rail cars beyond a specified free time. There were significant shipper complaints regarding how CN applied its demurrage charges and, in particular, the accuracy of CN's bills. Many stakeholders incurred additional staff costs to keep track of CN's demurrage and to challenge bills. Less significant complaints were also received on CP's demurrage practices.

### General responsiveness to customer complaints

Shippers and other non-railway stakeholders also argue that railways are not as responsive as they should be when issues or concerns are raised. This includes providing non-railway stakeholders with clear points of contact with the authority to address issues, and an efficient escalation process to elevate issues that cannot be addressed at the first point of contact.

Improving communications should be a relatively low-cost and high-return remedy for addressing customer service issues. Most stakeholders believe it would go a long way to addressing communications issues if the railways hired and trained more people and empowered them to make decisions. Many of the other potential solutions put forward under the review would lead directly or indirectly to an overall improvement in service and a corresponding improvement in communications. More effective communications can facilitate discussion and resolution of day-to-day operational issues and minimize the number of problems that arise.

**Summary of impacts:**

> Poor customer service and poor communications contribute to deterioration in relations, system inefficiencies and increased system costs.

#### 4.1.1.5 *Sustainability*

Throughout the submission and consultation process, the issue of sustainability was a concern for virtually every stakeholder. Stakeholders recognize that the railways have undertaken several key initiatives since the beginning of 2010 to address service issues. However, many are of the opinion that once the "light" of the Rail Freight Service Review Panel is gone, there is no assurance the railways' current initiatives and recent service improvements will continue. Conversely, the railways argue that their recent initiatives are deep-rooted and, more importantly, consistent with their commercial interests going forward.

### 4.1.2 KEY SOLUTIONS IDENTIFIED BY NON-RAILWAY STAKEHOLDERS

Stakeholders submitted many proposed solutions to the issues they identified. The Panel has grouped the key solutions raised by non-railway stakeholders into the following categories:

- More competition;
- Service agreements;
- Performance measures, reporting, standards and penalties;
- Commercial dispute resolution (CDR); and
- Sustainability.

#### 4.1.2.1 *More Competition*

As discussed previously, many non-railway stakeholders identified the railways' market power as the primary reason for service issues within the rail-based logistics system. Nonetheless, there were only a few proposals to directly increase railway competition. Those proposals identified a number of ways of allowing more than one railway to operate over existing rights-of-way, including:

- implementing the 2001 recommendations of the CTA Review Panel on expanded running rights, including traffic solicitation rights;
- promoting public-private partnerships with regard to infrastructure or having the railways split their corporations into separate infrastructure and train-operating entities;
- establishing a Crown corporation to obtain control of tracks, which would open up the system to multiple users;
- encouraging public ownership (possibly through public/private partnership) of the low-volume lines, with running rights given to all railway companies; and
- extending interswitching zones and increasing the number of zones to ensure that a shipper captive to a single federal railway has access, at a regulated rate, to another railway at the interchange of the shipper's choice.

> *"Many other stakeholders, including some shippers, expressed concern about the adverse impacts of expanded running rights on railway investment, operational efficiency and safety, and the potential impact on traffic through major corridors such as the Asia-Pacific gateway and corridor."*
>
> **Extract from the February 2007 Issue Paper on Running Rights prepared for the House of Commons Standing Committee on Transportation, Infrastructure, and Communities when it considered Bill C-58, proposed amendments to the shipper protection provisions.**

The Panel notes that most stakeholders suggested that service issues be addressed by less direct measures, such as penalties and commercial dispute resolution aimed at rebalancing the relationship between railways and others stakeholders, as discussed below.

#### 4.1.2.2 Service Agreements

Some stakeholders have suggested that poor service and the lack of railway accountability be addressed through service agreements that would establish roles, responsibilities and obligations between railways and stakeholders. Most of the suggestions came from terminals, ports and shipping lines, and most were focused on the rail services provided for import container traffic. Terminal operators and shipping lines interact operationally with railways, but do not have any formal mechanisms to clarify roles and responsibilities between themselves and the railways – except for shipping lines when they are shippers.

Ports and terminals suggested that railways, upon request, be required to enter into good faith negotiations with them to establish service agreements. Several submissions advocated service agreements between shippers and railways. Some stakeholders suggested that if agreements could not be reached and/or if there were no meaningful improvements in rail service over a period of time (two years, for example), then government should amend the CTA to compel railways to enter into such agreements. Other stakeholders recommended that legislation be changed immediately.

Although there are subtle differences among submissions, the framework for service agreements includes:

- defining service obligations and expectations of each party, for example, switching frequency;
- establishing Key Performance Indicators (KPIs), including the possibility of performance standards or benchmarks;
- collaborating on data systems to improve accuracy and predictability;
- establishing communication protocols to share operational information;
- creating a framework/protocol for addressing service changes;
- prescribing an escalation process to resolve disputes; and
- specifying consequences, including financial penalties, for not meeting KPI benchmarks/standards.

Some submissions recommended bilateral agreements between railways and terminals should be supported by complementary agreements between shippers and railways to ensure consistency of service delivery among parties in the supply chain.

There was a suggestion that "boiler plate" service contracts be developed between small shippers and railways and between ocean carriers and railways. These would define relationships and include service standards against which performance on all sides could be measured. The shipping lines also recommended that the CTA be amended to provide for port/terminal service agreements with the railways that would be developed through a consultative process among the parties.

#### 4.1.2.3 Performance Measures, Reporting, Standards and Penalties

A number of stakeholders believe that performance measures, reporting, standards and penalties are a means of improving transparency and accountability within the rail-based supply chain which would, in turn, lead to better system performance.

##### Performance measures and reporting

A large number of stakeholders have called for, as a minimum, improved reporting on performance measures, mostly by the railways. Improved performance reporting could be used to identify problems and solutions and could be used by shippers as input in determining whether or not to file LOS complaints.

Performance reporting can be at two levels. The first level is confidential reporting between two commercial partners. In the case of railways and individual shippers, confidential bilateral reporting would include basic KPIs related to such things as order fulfillment and switching performance at origin, transit times, ETAs and switching performance at destination. The second level is KPIs aggregated at a sector/commodity group, car type and/or regional level. The KPIs could include data related to car supply as well as aggregated data on order fulfillment, transit times, ETAs and performance at destination.

The KPIs would be used by individual shippers to track the performance of their traffic for operational reasons, to identify problems to be resolved bilaterally with railways, and to compare performance relative to all other shippers in their sector and to the overall performance of the railways. Furthermore, this type of data could also be used to support LOS complaints. The aggregated data would also enable the government and industry stakeholders to monitor changes in performance over time and could help identify problem areas from a policy perspective. Similar KPIs are being established for performance at terminals and ports through collaborative agreements and memorandums of understanding.

Some stakeholders have suggested that increased transparency regarding railway operations would also result in greater accountability by the railways, as they would be motivated to manage those KPIs.

### Performance standards

Many non-railway stakeholders believe that performance measures and reporting should include pre-established standards to define responsibilities, expectations and consequences of non-performance.

These non-railway stakeholders recommended the establishment of service standards for all system participants, including the railways, ports and terminal operators. The standards would become benchmarks against which the performance of individual stakeholders and the overall system could be measured.

Ports and terminals generally recommended service agreements as a way to establish level of service standards. The service agreements could contain key performance metrics and standards.

Many stakeholders see standards as a way of making the railways and others more accountable, especially if penalties were to be applied for not meeting standards.

### Monitoring

Many non-railway stakeholders who raised the need for high-level performance measures also felt that government should monitor rail service performance either directly or through a third-party monitor or ombudsman. Depending on the model selected, this oversight body could undertake a variety of roles, from collecting data and reporting on performance measures, to setting and/or monitoring standards or even to setting and/or monitoring penalties. The monitor could potentially give advice to the government or the Agency on level of service issues, conduct investigations of rail service and resolve disputes between parties.

### Penalties

The establishment of a performance-based penalty system is seen by many non-railway stakeholders as an important tool for providing shippers more leverage in obtaining more consistent, reliable and predictable rail service. They point to the railway penalty tariffs that are designed to provide incentives for good shipper behaviour as a successful model.

A number of penalty-related notions have been raised:

- reciprocal penalties to offset demurrage or other ancillary charges;
- expanded Agency powers to launch investigations on its own motion, including the authority to award penalties and damages;
- a third-party monitor to set standards and administer penalties;
- penalties in service agreements; and
- administrative monetary penalties for major service failures.

### 4.1.2.4 Commercial Dispute Resolution

In addition to the CTA shipper protection provisions, shippers and railways have the option of using commercial dispute resolution mechanisms. Commercial mechanisms can be quicker, less expensive and less confrontational than regulated remedies or court proceedings. As such, interest in the use of commercial dispute resolution mechanisms is growing within Canada.

In 2007, the CTA was amended to give the Agency the authority to conduct mediation and/or arbitration under commercial processes in order for parties to use the Agency's expertise under commercial dispute resolution processes, if they so decided.[12]

In 2006, significant progress was made on developing a commercial dispute resolution (CDR) process between the railways and the Canadian Fertilizer Institute (CFI). The main goal of these discussions was to "develop an effective, balanced, timely and low-cost commercial dispute-resolution model that could be used by CFI member companies and the railways to resolve problems respecting both line-haul freight rates and the freight services provided by the railways…"[13] Although there was progress, some railway-specific differences did exist. CP initially agreed to apply CDR to service disputes on movements over CP lines between Canada and the United States, but did not want CDR applied to rates on those movements. CN initially agreed to allow CDR for line haul rates over all CN local and joint lines within Canada and over local CN lines within the United States. However, it refused to extend CDR to service disputes related to those movements. In the end, CP discontinued consultations and CN followed suit as a result of the proposed application of the process to movements into the United States.

> *"It is critical that any CDR be a voluntary process requiring the agreement of both parties. A truly neutral, effective and timely resolution process should have no difficulty attracting willing participants."*
>
> **April 30, 2010, Coalition of Rail Shippers' submission to the Panel, page 6.**

Notwithstanding the breakdown in negotiations on a CDR process, both railways unilaterally posted CDR "agreements" on their websites in early 2007. However, there was little, if any, interest from shippers, who did not believe the railways' CDRs were appropriately balanced. The railways eventually removed the agreements from their websites. Both CN and CP have recently re-posted CDR agreements similar to those presented in 2007.

An effective CDR process requires broad acceptance both by railways and non-railway stakeholders. Some stakeholders suggested the government should encourage and facilitate discussions between the railways and shipper groups to negotiate a mutually acceptable framework to resolve disputes on service issues. Many stakeholders believe that a commercially negotiated solution will not be reached and have instead suggested regulations to establish a more effective, more timely and less expensive dispute resolution mechanism than the final offer arbitration process contained in the CTA.

---

[12] Sections 36.1 and 36.2 of the *Canada Transportation Act*.

[13] Larson, Roger. *CFI Submission to the Rail Service Review Panel*, April 30, 2010.

#### *4.1.2.5 Sustainability*

Non-railway stakeholders prefer that solutions be sustained through legislation and/or regulation. While legislation and regulations can be changed over time, this is generally viewed as the strongest approach to sustainability. The submissions from most non-railway stakeholders support, or imply support for, regulatory solutions. Many stakeholders have difficulty with a commercial approach that essentially relies on trusting the railways – unless there is some type of regulatory fallback.

### 4.1.3 KEY ISSUES AND SOLUTIONS IDENTIFIED BY CN AND CP

Both railways feel that the current market-based policy framework works well and continues to achieve good results. Furthermore, CN and CP claim that based on the existing level of intermodal and intramodal transportation competition, the existing CTA provisions and current railway initiatives, there is no need for additional railway regulation.

The railways have admitted to service problems over the past several years, and have indicated they are addressing them. They also argue that service failures are not always the result of poor rail service, but can be attributed to the behaviour of other players in the system or circumstances beyond anyone's control. The railways believe they should not be solely responsible for acquiring, constructing and maintaining the freight logistics system's capacity to handle surges or contingency situations.

Examples of system failures, identified by the railways as beyond their control include:

- difficulty loading traffic onto vessels due to rain, high winds, or other weather-related factors;
- broken equipment – conveyors, for example – used for loading or unloading at origin or destination;
- labour shortages and/or issues at shipper or receiver facilities; and
- vessel delays/bunching.

System failures at ports can be particularly problematic, since they can lead to congestion and delays in returning empty cars for subsequent movements. In addition, some smaller receivers at port do not have sufficient business to warrant seven-day operations. This can contribute to inefficiencies, such as weekend congestion in railway yards.

The railways indicate that they continue to promote the development and establishment of memorandums of understanding, collaboration and service agreements with various stakeholders in the supply chain. CN has established these arrangements with:

- Halifax Port Authority (including Ceres Corp. and Halterm Partnership);
- TSI Terminal Systems Inc;
- Port Metro Vancouver;
- DP World (Centerm Terminal);
- Prince Rupert Port Authority and Maher Terminals;
- Port of Quebec; and
- Montreal Port Authority.

Currently CP has arrangements with:

- TSI Terminal Systems Inc;
- Teck Coal; and
- DP World (Centerm Terminal);

With respect to sustainability, the railways prefer an approach that relies on "commercial forces" rather than the implemention of new regulations. The commercial approach acknowledges that the railways are changing their policies and practices and will continue to change them to address service issues.

### Variability in vessel arrival times for intermodal traffic

Both railways raised the variability in vessel arrival times for import containers as an issue that impacts railway operations and affects rail service. Railways noted that railway operations are affected by late vessel arrivals due to weather or to slow-steaming and by vessel bunching caused by late vessel arrivals and/or vessel berth windows that tend to be concentrated during the week. In addition, the seasonality of the import business in containers creates the variable demand for railway equipment. This variability leads to challenges for the railways' operating model, which attempts to balance the flow of inbound and outbound traffic for railway efficiency reasons.

A related issue for railways is the accuracy of freight container forecasts beyond two weeks. The railways believe improved forecasts would help them better manage their intermodal fleets. Railways have been working with port authorities and shipping lines to improve this forecasting element.

**Summary of impacts:**

Seasonality in demand is a known characteristic of the import business. This creates challenges in matching container volumes to rail resources. Variability of vessel arrivals related to operational factors of the shipping lines and the variability of rail car arrivals at port should be bilateral issues to be resolved between railways and shipping lines.

### *4.1.3.1 CN's Perspective on Issues*

CN believes that service-related issues are best dealt with on a commercial basis and that there is no need to increase regulations.

CN states that it has evolved significantly as a company since the early 1990s. Among other things, it has made significant acquisitions, as well as significant investments in infrastructure. It has also been a leader in innovative changes, such as precision railroading and the scheduled railway concept. These changes have resulted in major improvements in railway efficiency. CN acknowledges in its submission that changes were often implemented without adequate consultation or transition periods. This, in turn, "has been a significant source of customer dissatisfaction." CN also acknowledges that service improvements achieved over the last 10 years were not applied uniformly.

CN believes the QGI findings support the conclusion that there is no market structure issue that needs to be addressed, primarily because there is no evidence of discrimination in service delivery. CN also claims that two-thirds of its traffic originates at locations served by a second railway and that the majority of the remaining traffic benefits from competition provided or influenced by trucking alternatives.

> *CN states that "railways cannot be expected to provide the buffer required to fulfill all of the cars requested by customers at all times, as each participant's own performance has a direct impact on the availability of empty cars."*
>
> **April 30, 2010, CN's submission to the Panel, page 12.**

### 4.1.3.2 CN's Perspective on Solutions

CN believes that balanced accountability is key to the success of well-functioning supply chains, because the responsibility for performance rests with all participants, not just with railways. In CN's view, the logistics system is best served by relying on normal commercial incentives to drive discipline and innovation. Overall, CN believes the move to deregulate the rail sector has been highly successful and that there is no justification for re-regulation.

CN would like the Panel to encourage all players in the supply chain to work seven days a week, volumes permitting. CN believes this would be a good first step to improving customer service and system reliability. In addition, CN feels that penalties should not be imposed only on the railways, given the significant interdependence of stakeholders regarding effective service performance within the complex logistics supply chain.

> *"The bottom line is that with a robust regulatory regime already in place, the clear absence of discrimination across various traffic categories, and with CN's commitment to implement structural and lasting service improvements in the quality of the interface with its customers, there is no need to impose new regulations or to institute impractical oversight and penalty regimes that would arbitrarily target the railways in Canada."*
>
> **April 30, 2010, CN's submission to the Panel, page 3.**

### 4.1.3.3 CN's Recent Initiatives

CN admits that some changes are required and is implementing a number of initiatives to improve service. CN's submission included the following major initiatives:

- Improving empty car supply processes through changes to its Guaranteed Car Order Program. This would aim to improve order fulfillment performance and allow customers more flexibility when placing car orders. When CN is unable to meet its guaranteed empty car supply, shippers will have the option of re-ordering the rail cars the following week. CN has implemented a scheduled grain service covering 95 percent of weekly grain traffic, and is phasing potash and other bulk products to a scheduled service plan. The scheduled grain service includes a strategic pool of empty cars at key locations to offset the variability of empty returns from ports.
- Pursuing better first-mile and last-mile results through improved switch window performance and better ETA accuracy at origin and destination. CN is developing a new performance scorecard with key metrics for customers, and improving notification processes for service changes as well as for planned service disruptions.
- Improving demurrage rules and billing processes through comprehensive rule changes to deal with bunching, placement outside the switch window and starting the demurrage clock only after cars have arrived at the serving yard at destination. CN is also improving reporting and billing accuracy through better audits and website developments.
- Improving customer service and issues resolution by conducting a complete review of customer service activities; developing a better process around issues escalation; improving its Customer Service Satisfaction Survey; and, implementing organizational changes in Marketing & Sales to enhance customer relations and deploy senior people closer to customers.

#### 4.1.3.4 CP's Perspective on Issues

CP contends that the majority of shippers today have effective intramodal and intermodal competitive choices to address their shipping needs plus, as a fallback, remedies in the CTA to address rate and service issues.

CP asserts that confidential contracts govern more than 75 percent of its business. In addition to covering rates and charges, such contracts set out railway obligations including:

- routings;
- service parameters;
- commitments related to equipment; and
- first-mile and last-mile service.

The contracts also contain a CDR process if shippers want to contest service-related issues. Furthermore, CP indicates that a substantial portion of its tariff business is subject to joint accountabilities such as those set out for grain shippers, who account for the majority of its tariff traffic. CP argues that it would be very difficult, inefficient, time-consuming and inappropriate to implement a system of penalties to address non-weather-related operational failures, given the difficulty in determining fault in the complex logistics system.

CP indicates that it is committed to resolving disputes quickly, fairly and in an enduring fashion via its CDR program. CP commits to undertake a communications strategy to raise shipper awareness of its CDR program. CP contends that it is unrealistic to expect that terminal operators and railways should have contractual agreements to cover performance expectations/accountabilities, given the complexity caused by the multiple players involved. Nonetheless, CP commits to maintaining strong ongoing relationships with non-shipper supply chain members through the establishment of written accords with key players. These would set respective expectations, performance, monitoring and communication protocols.

CP indicates it is committed to improving the workings of the logistics supply chain and illustrates this through its involvement with the government-sponsored Asia-Pacific Gateway and Corridor Initiative.

#### 4.1.3.5 CP's Perspective on Solutions

In its submission, CP indicates that the Panel should acknowledge/recognize/recommend the following:

- the importance of confidential contracts as a tool, where appropriate, to ensure that parties meet their respective obligations;
- the importance of other supply chain parties in the rail-based system and the role railways can play in entering into collaborative working accords that set out expectations, performance, monitoring and communications protocols for each party;
- that the strengths and successes of the collaborative best practices (assessment of supply chain processes and implementation of improvements, winter planning, performance tables, and infrastructure improvements) which are integral to the Asia-Pacific Gateway/Corridor Initiative should be extended to address other supply chain issues when they materialize; and
- that a collaborative effort be undertaken to more fully utilize supply chain capacity and that 24/7 operations should be the standard business practice for supply chain participants.

#### 4.1.3.6 *CP's Recent Initiatives*

CP noted that it is pursuing the following major initiatives to improve service:

- Improving "last mile" performance by commencing selected yard reliability programs, starting with Winnipeg;
- Enhancing supply chain collaboration by entering into working accords with supply chain partners, including terminals. These delineate respective expectations, performance, monitoring and communications, with the goal being to increase overall visibility on elements of active cooperation;
- Expanding the use of regularly scheduled supply chain sessions with all major customer segments to discuss service parameters, performance and agreed-upon service improvements. These would take place on a semi-annual basis subject to agreement from other supply chain partners;
- Ensuring qualified customer service representatives continue to be available to customers;
- Developing a tailored communications approach for smaller customers to enable them to better communicate with CP and to meet the specific needs of employees in smaller organizations trying to effectively and efficiently deal with a large company like CP; and
- Increasing the use of technology by staff, for example, the recent deployment of automatic inventory reporting tablets to increase the accuracy and timeliness of demurrage administration.

> *"Any proposals to increase regulation at this time would have a negative impact on the rail supply chain. In a competitive market, the revenues earned by a railway must be sufficient to attract the capital needs for operating expenses, replacement of existing infrastructure, and needed equipment, technology, and demand-driven capacity expansions."*
>
> **April 30, 2010, CP's submission to the Panel, page 2.**

## 4.2 STAKEHOLDER COMMENTARY IN RESPONSE TO INTERIM REPORT

The Panel received submissions from 46 stakeholders in response to the Interim Report, as summarized in Table 5.

**Table 5: Stakeholders Providing Submissions on Interim Report**

| Stakeholder Group | Number of Stakeholders |
|---|---|
| Railways (Class I) | 2 |
| Associations and organizations | 25 |
| Governments and Agencies | 10 |
| Shippers | 4 |
| Shipping lines | 1 |
| Terminals, ports and transloaders | 4 |
| **Total** | **46** |

This section summarizes the major points that were raised.

### 4.2.1 MAIN COMMENTS FROM NON-RAILWAY STAKEHOLDERS

Most of the non-railway stakeholders agreed with the details of the four key elements proposed by the Panel in the Interim Report. These were similar under both the commercial and regulatory approach. (See Appendix H for the recommendations from the Interim Report on the four key elements under the commercial approach). However, most non-railway stakeholders had concerns over the Panel's approach for drafting legislation in anticipation of its possible need following a 2013 assessment. These stakeholders believe sustainability can only be achieved if legislative changes to address a rebalancing of relationships are in place.

## Shippers and Shipper Associations

Most shippers relied on their associations to represent their views during the Panel process. Very few shippers introduced new comments regarding the key issues identified in the Interim Report that were not previously raised in their original submissions. Many commended the Panel for successfully summarizing and acknowledging the many complex service issues raised during the first round of stakeholder submissions and subsequent consultations. They also acknowledged the Panel's conclusion regarding the need for change.

Most shippers acknowledged that there has been some improvement in recent rail service, but linked those improvements to the fact traffic volumes are low due to the economic downturn, the presence of the Rail Freight Service Review and the threat of legislation. These shippers believe that recent service levels are still inadequate, and that there is room for substantial improvement. Some shippers stated that rail service in their sector had not recently improved.

Most shippers are strongly opposed to the Panel's approach on legislation – immediate drafting of enabling legislation, followed by an assessment in 2013 that would trigger the implementation of the legislation if warranted. They strongly believe that the proposed rebalancing of relationships between railways and other stakeholders is best achieved by implementing legislation immediately. They further believe that the rebalancing would only be sustainable over the long term if legislation is in place.

> *"By simply encouraging the railways to implement commercial solutions, the Panel's recommendations do not effectively address the root cause of railway service failures, nor do they ensure that the solutions will be sustained into the future. The CRS fails to see how the Panel could conclude that sustainable commercial solutions can be achieved when the fundamental conditions that lead to fair negotiations and balanced agreements do not exist."*
>
> **November 3, 2010, Coalition of Rail Shippers' submission to the Panel on the Interim Report, page 3.**

A number of shippers continue to offer strong support for performance standards and penalties and some type of performance monitoring as core elements of regulatory reform.

## Other non-railway stakeholders

Ports acknowledged that recent agreements with their respective railways have resulted in a closer port, terminal and railway relationship, with increased service levels and expectations that these service levels will be maintained going forward.

Submissions from some government stakeholders requested the Panel recommend that Transport Canada monitor rail service closely and, if required, implement mechanisms that will increase competition such as open running rights, extended interswitching and competitive access provisions for shortlines.

### 4.2.2 MAIN COMMENTS FROM CN AND CP

Both railways strongly oppose the Panel's advanced drafting of legislation. Both railways also strongly oppose specific aspects of the Panel's recommendations, particularly arbitration on initial service agreements. They contend that these elements would not only create a disincentive for continued meaningful discussions and collaboration but would also, if implemented, stifle innovation and progress. Both railways reiterated in their submissions that commercial approaches are preferred to additional regulation. Specifically, CN argued that no legislation should be drafted until after a 2013 assessment while CP argued no legislation is required at all. Both railways believe recent railway initiatives, combined with various competitive options available to most shippers and with the existing regulatory provisions as a fallback, will ensure that shippers receive adequate service.

Both railways took issue with the Panel's discussion and conclusions regarding competition and market power, and suggest the Panel based its recommendations on this flawed reasoning. In general, both railways believe the Panel's assessment of competition and market power is, in addition to being outside the Panel's terms of reference, misguided and not based on any substantiated evidence or data. (For a more detailed discussion on market power and competition, including the railways' reaction, see section 5.3.)

The railways were also critical of the Panel for focusing solely on the role of the railways in the logistics supply chain. They argued that the Panel did not consider how the actions or inactions of certain stakeholders could affect the performance of others or overall supply chain reliability. (For a discussion of the complexity of the rail-based logistics system, see section 5.2.)

### 4.2.3 UPDATE ON RECENT CN AND CP INITIATIVES

Since their initial submissions, CN and CP have continued to expand on previous commitments and/or implement new initiatives aimed at improving the performance of the total supply chain.

Specifically, CN has continued to develop and implement customer-focused initiatives aimed at service level improvements. Updates on CN's individual initiatives previously discussed in its original submission can be found in CN's commitment letters in Appendix M. CN's new initiatives include:

- Developing new supply chain efficiencies to help it better meet the short-term car order requirements of major steel producers.
- Setting up weekly conference calls with customers to review performance and discuss future orders and supply.
- Improving processes and communications with customers using their private fleets.
- Signing an agreement with Lynnterm Terminal and forest-products customers to produce a more consistent flow of forest-products traffic – CN providing daily service.
- Developing a comprehensive new supply chain approach to managing the flow of coal from mines to west-coast terminals.
- Mobilizing a cross-functional team to review and streamline the Optional Services process.
- Improving functionality and penetration of CN's suite of eBusiness tools.
- Working with supply chain partners on improving goals found in recent agreements with terminals and ports.

CP noted it has been updating and/or implementing several initiatives aimed at improving supply chain performance. Updates on CP's initiatives discussed in its original submission can be found in CP's commitment letters in Appendix N. CP's new initiatives include:

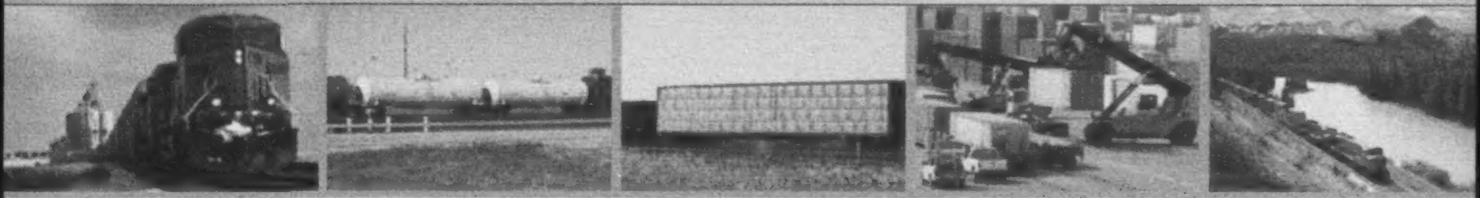
- Implementing Yard Reliability Programs in Toronto (fall of 2010), and at Vancouver, Edmonton, Red Deer, Moose Jaw, Regina and Montreal in 2011.
- Focusing on smaller customer needs through surveys and feedback sessions regarding programs such as the Yard Reliability Program.
- Increasing the visibility of CP's CDR process. CP has had five small-to medium-sized stakeholders pursue the CDR process recently.

## 4.3 CONCLUSION

In conclusion, most stakeholders have acknowledged that there have been some recent improvements in rail service, especially by CN. Some of these stakeholders, however, attribute the service improvements to the reduced demand for railway service relative to the booming economy of a few years ago as well as to the Panel's presence, which has motivated the railways to take immediate steps to improve rail service. Most shippers also acknowledge that more needs to be done to address their service concerns. The vast majority of other stakeholders who have commented on this issue feel very strongly that the Panel has not gone far enough and that immediate legislative amendments are required to ensure rail service continues to improve, and that these improvements are sustainable.

Both CN and CP believe that, taking into consideration their recent service initiatives and plans for further improvements, there is no need for additional regulation. They also feel that further regulation, in particular the recommendations outlined by the Panel in its Interim Report, would be detrimental to the future of supply chain collaboration and railway innovation.

# CHAPTER 5



## 5. CONSIDERATIONS

This chapter describes the key considerations that guided the Panel in developing its recommendations. The Panel considered comments and suggestions received from stakeholders, whether in their initial submissions, through consultations, or from their reactions to the Panel's Interim Report. (This is summarized in Chapter 4.)

### 5.1 IMPORTANCE OF EFFECTIVE SUPPLY CHAINS AND BALANCING STAKEHOLDER INTERESTS

An effective supply chain is critical to meeting the government's objectives related to strategic gateways and trade corridors and to help shippers compete in domestic, continental and international markets, thereby strengthening the country's economic performance. Most shippers face strong competition for their products in the markets they serve.

The sectors that use rail contribute significantly to the Canadian economy. For example, an October 2009 report, prepared by the Policy and Economic Analysis Program of the University of Toronto's Rotman School of Management, estimated that four key Canadian bulk shipping industries (oilseed & grain farming, coal mining, wood products manufacturing, and pulp & paper and paper products manufacturing) contribute over $81 billion to the Canadian gross domestic product each year and account for close to 1,000,000 jobs. These and other sectors need efficient, effective and reliable rail service.

Railways are an important contributor to a healthy Canadian economy. In 2008, the railway industry employed over 34,000 people. The Class I railways (CN and CP) carried approximately 247 million tonnes of freight in 2008 and had revenues of $9.9 billion. In 2009, CN and CP invested over $2.1 billion in capital programs for track, signals, sidings, locomotives and railcars. The Railway Association of Canada claims that 75 percent of surface tonne kilometres of freight moved in Canada is by rail.

There is no disputing that financially viable railways are critical to the success of the Canadian economy. Railways need sufficient revenues to maintain and improve existing rail services and to invest in additional capacity (infrastructure, equipment and crews) in order to respond to the current and future needs of shippers. It is important that the railways' financial success be attributable to commercial factors and not be dependent on government subsidies. At the same time, if the railways' success comes at the expense of shippers, through poor and unreliable service, there is a risk that the resultant damage to Canada's reputation as a reliable supplier could exceed the economic benefit of the railways.

In developing its recommendations, the Panel considered the need to balance the interests of various stakeholder groups, as well as the overall interests of the Canadian economy.

## 5.2 COMPLEXITY OF THE RAIL-BASED LOGISTICS SYSTEM

The rail-based logistics system is complex and involves a range of stakeholders, including shippers, railways, terminal operators, transloaders, ports, shipping lines and trucks. As well, there is a broad range of factors affecting efficient and reliable service, some of which are under the control of railways and others under the control of shippers, receivers/terminals and shipping lines. Problems incurred by any one of these stakeholders can cause system congestion impacting all stakeholders. There are also other factors beyond anyone's control, such as disruptions related to severe weather or accidents. Any of these problems can disrupt the entire system for extended periods of time.

The rail portion of the logistics system is, by itself, quite complex. For example, CN and CP operate nearly 1,300 trains a day. These serve hundreds of customers and their work involves the planning, scheduling and management of approximately 2,000 train crews, 3,000 locomotives and 200,000 rail cars. In 2009, there were approximately 28,000 route-miles of track in Canada, about 75 percent of which were owned or leased by CN and CP. CN and CP have to coordinate their operations with other railways, including 49 shortline operators, with whom they interchange approximately 10,000 cars a day. In addition, the railways have to coordinate their activities with other logistics partners, including shippers and receivers, ports, terminals and transloaders.[14]

> *"...when cars are assembled in blocks and then into trains, they can move efficiently according to the plan that placed them in these blocks. However, when an individual car falls behind schedule, there are few meaningful opportunities for railways to recover the performance of that car."*
>
> **QGI Consulting,** *Description of Canada's Rail Based Freight Logistics System,* **November 2009, page 6.**

In developing its recommendations, the Panel recognizes that in a complex supply chain, it is inevitable that operational problems will occur. The public policy challenge is to develop a policy framework that encourages good performance, keeps problems to a minimum and encourages quick and cost-effective solutions when problems do arise. This should be achieved with the least possible regulation in order to provide all parties, railways and others, with the flexibility they need to operate successfully on a day-to-day basis.

## 5.3 COMPETITION AND RAILWAY MARKET POWER

The Panel notes that, over the last few decades, transportation deregulation, including rail deregulation, has generally been a success. CN and CP are financially viable, have achieved significant productivity gains and are able to maintain and improve railway infrastructure and equipment with virtually no public subsidies – except where subsidies contribute to broader public objectives, such as improving urban transit and expanding Canada's transportation gateways and corridors.

---

[14] QGI Consutling, *Description of Canada's Rail Based Freight Logistics System*, November 2009, page 7.

> *"Productivity has grown at an average annual rate of 3.6 per cent per year for rail freight … By comparison, productivity in the overall business sector in Canada during the same period (1981–2006) grew by only 0.2 per cent per year."*
>
> **Conference Board of Canada,** *The Productivity Performance of Canada's Transportation Sector – Market Forces and Governance Matter,* June 2009.

While deregulation has been a success, the Panel heard opposing views in submissions and through consultations on the degree of competition and captivity that exists in the rail-based supply chain. Many shippers have noted that they are generally reliant on rail to move their products to market, and even in cases where they have access to another railway, a "dual monopoly" does not provide them with the necessary leverage to achieve "adequate" service or to obtain relief when they experience service problems.

On the other hand, the railways believe that the Panel's Interim Report conclusions about railway market power were made without regard to competitive alternatives for rail traffic. The railways' position is that the Phase I research did not identify any market-power structural issues that need to be addressed through regulations or administrative oversight. The railways also indicated that the Panel did not have the mandate to examine market power.

The extent of effective competition as it pertains to rail service is a key issue that the Panel wishes to address in greater detail.

The Panel believes it had not only the mandate but also the responsibility to examine railway market power. The terms of reference for the Review, which guided the Panel's work, specified that the Review would examine the extent to which service issues are a function of the absence of transportation alternatives. Captivity and railway market power were raised as key issues in numerous submissions, including those from the railways, whose views differed significantly from most non-railway stakeholders. For these reasons, the Panel determined it needed to consider whether the issue of market power was a potential cause of poor service, especially since so many non-railway stakeholders identified it as the main cause.

The CTA Review Panel, in its 2001 report, assessed competition in the rail freight sector. It found that "Canada's rail system is not inherently anti-competitive", that the "railways face effective competition overall" and that "most shippers in most markets in most parts of the country are well served."[15] The CTA Review Panel also concluded "that there are cases where market forces are inadequate; in those situations, appropriate recourse is necessary to protect shippers against potential abuse of market dominance by a carrier."[16]

The Rail Freight Service Review Panel notes that based on the NRG shipper survey, satisfaction with rail service appears to have declined significantly between the CTA Review Panel Report and the current review. The 2001 Shipper Survey found that 71 percent of carload shippers and 85 percent of non-intermodal users were satisfied with overall service provided by the railways[17]. The NRG survey, in 2009, found that only 17 percent of respondents still rated railway service as satisfactory. These findings might explain the extensive complaints received about rail service by the Rail Freight Service Review Panel.

There are a large number of origins, particularly in urban areas, that are served directly by both CN and CP or are within regulated interswitching limits. Consequently railways indicate that aggressive head-to-head competition exists in those places. The

---

[15] Canada Transportation Act Review, *Vision and Balance*, June 2001, page 56.

[16] Canada Transportation Act Review, *Vision and Balance*, June 2001, page 57.

[17] Canada Transportation Act Review, *Survey of Shippers*, April 2001, page 8.

Panel notes that while a pro-competitive provision, competitive line rates, has been available to shippers for approximately 20 years, it has rarely been used and, not at all in recent years. This remedy requires the competing railway to provide a rate from the interchange before the shipper can require the originating railway to provide the competitive line rate. It appears that this provision is not being used because the competing railways will not provide a rate or, at least, not a competitive rate. The non-use of this provision suggests railways may not aggressively compete even where rail-to-rail competition exists.

CN refers to QGI's finding that there was little differentiation in the transit times, when analyzed for a number of characteristics, such as shipper size, flow size, access to competition, core versus non-core railway origins and shortlines versus CN and CP origins. CN concludes that this lack of discrimination is evidence that there is no structural problem with railway service, that effective competition exists, and, therefore, there is no need for increased regulation. The Panel notes the significant variability of transit times also reported by QGI, the impact this can have on shippers and receivers or indeed the entire supply chain, and suspects a different result might occur in a more competitive environment. QGI wrote to the Panel in June 2009 (See Appendix O) to note that it is "an overstatement of our analysis and our conclusions" for the railways "to conclude with certainty that there are no problems with a lack of market competition in the Canadian freight rail industry. QGI believes much more analysis would be required to reach this conclusion." QGI went on to say "our Operating Practices report, which identified serious problems with a lack of responsiveness of railways and evidence of a lack of collaboration between railways and their various stakeholders, could be seen as evidence that problems due to limited competition in the industry do exist."

Both railways refer to types of competition, other than intra-modal, that railways face. These include inter-modal, geographic, and product competition.

Research work cited by the CTA Review Panel suggested that the amount of rail traffic actually contestable by truck is limited.[18] Furthermore, the survey of shippers prepared for the CTA Review Panel noted that "shippers using rail were asked whether their products could be trucked to the reload centres of other railways and, if so, to how many of their facilities this applied. Although 48 percent of shippers said at least one of their facilities was in this category, this applied to only six percent of all facilities of all respondents. In addition, very few shippers indicated that they owned a facility or facilities on a different railway that enabled them to apply pressure in obtaining rates or service. Any impact of such competition on freight rates or level of service could not be identified in the survey."[19] QGI concludes that for shippers of many commodities it is impractical to take advantage of indirect rail competition. QGI indicates that freight rate differentials are generally not sufficient to cover the added costs, which can include: product degradation through multiple handling of some commodities; prohibitive costs to establish safe handling reload facilities for dangerous goods; added trucking costs to ship product from the origin to the reload centre and extra handling costs.[20]

Respondents to the CTA Review shipper survey were also asked about geographic and product competition. They were asked whether they could use a different carrier by shipping to or from a different destination or by using a substitute product. A small number of rail shippers indicated that this was the case for some facilities."[21]

---

[18] Canada Transportation Act Review, *Vision and Balance*, June 2001, page 30.

[19] Canada Transportation Act Review, *Survey of Shippers*, April 2001, page 13.

[20] QGI Consulting, *Description of Canada's Rail Based Freight Logistics System*, November 2009, page 56.

[21] Canada Transportation Act Review, *Vision and Balance*, June 2001, page 30.

> *"The problems of balanced accountability were of particular interest to railway customers who do not have practical access to transportation alternatives. For these so-called "captive" customers, railway decisions which restrict their capacity or increase their costs cannot be offset through adjustments to logistics strategy. For these customers, the issue of balanced accountability is of strategic importance to their business. However, customers in all business segments, regardless of their access to alternative transportation, also expressed concerns that could be broadly grouped under this general heading."*
>
> **QGI Consulting,** *Analysis of Operating Practices,* **October 2009, page 8.**

Both railways refer to the Phase I study by CPCS Transcom Limited as evidence that the existing regulatory framework is "robust". The consultant compared regulatory regimes for U.S. rail carriers and those that may exist in other industries, and concluded that none of the schemes were found to be clearly superior, in an overall sense, to the current LOS regulating rail freight services. In accordance with the terms of reference, the study did not examine the effectiveness of the current LOS obligations, nor did it look at whether they were sufficient to ensure Canadian federal railways provide adequate and reasonable rail service.

Despite the railways' comments that current shipper protection provisions are adequate to protect shippers' interests, the Panel is convinced that, based on the preceding factors, the effectiveness of these provisions is somewhat limited and, during the period leading up to the review, did not ensure that service was reasonably adequate. The Panel notes that LOS provisions address problems after the fact; that the process is lengthy and can be very costly; and that remedies are provided only on a go-forward basis. The FOA process can be very expensive, is usually used for rate disputes and may not be well suited to addressing service issues. The FOA process requiring a shipper to submit its final offer in advance of the railway's final offer is a disincentive to use these provisions for rail service disputes. Problems generally have to be very significant for a non-railway stakeholder to pursue CTA remedies.

There is no doubt that effective competition exists in some markets. However, based on a broad range of considerations, the Panel does not believe that the degree of *effective* competition is as extensive as the railways indicate. This is consistent with the results of the CTA Review Panel survey, the NRG surveys and QGI's quantitative analysis and conclusions. Furthermore, if there was *effective* competition, the Panel believes it would not have received so many complaints from shippers and shipper representatives. If more stakeholders had access to effective competition and/or effective regulatory tools, it is unlikely that the government would have felt the need to undertake the current service review. The fact the railways are undertaking a number of initiatives to improve service is also recognition that there were problems that needed to be addressed. Finally, it has long been recognized in transportation law that regulations are required to address the potential abuse of market power by the railways.

Based on the considerations discussed above, the Panel concludes that railways continue to have market power over some of their customers and that there are sectors and regions where competitive alternatives are limited or lacking altogether. This railway market power results in an imbalance in the commercial relationships between the railways and other stakeholders.

## 5.4 RECENT RAILWAY INITIATIVES

In developing its recommendations, the Panel notes that the railways are taking immediate and encouraging steps to address service issues through a number of initiatives described in Chapter 4. Most stakeholders have acknowledged that there have been some recent improvements in rail service since the period covered in the Phase I reporting, but believe there is room for more progress. Customer service and communications are also better. However, many stakeholders attribute these improvements to the relatively low traffic volumes at the beginning of the Panel process and to the Panel's presence, which has motivated the railways to be more responsive pending completion of the review. Many shippers suggest that more needs to be done to enhance their ability to deal with railway service concerns. The Panel concurs with shippers on this point.

Both CN and CP believe that, taking into consideration their recent service initiatives and plans for further improvements, there is no need for additional regulation. The vast majority of other stakeholders who have commented on this issue feel very strongly that legislative amendments are required to ensure rail service improvements continue and are durable and sustainable.

*Having acknowledged that the railways have recently made some progress, a fundamental issue facing the Panel is whether or not on-going commercial efforts by the railways will achieve an adequate level of service in the absence of further improvements to the shipper protection provisions of the* Canada Transportation Act.

## 5.5 SUSTAINABILITY

Almost all non-railway stakeholders indicated that railways have the ability to arbitrarily change service levels. While recent service improvements are welcomed, non-railway stakeholders indicate they do not have sufficient leverage to hold the railways accountable, thereby ensuring that improvements to service levels are sustained. They submit that the Panel's solutions must address this issue. The railways believe that regulatory changes are not required, since service improvements will be sustainable through a combination of commercial initiatives, market competition and existing CTA remedies. The Panel believes that solutions to address rail service issues that are designed to achieve a long-term rebalancing of commercial relationships between railways and shippers are required to ensure improved and sustainable service levels in the future.

## 5.6 IMPROVED PROCESSES TO DRIVE RESULTS

The Panel favours commercial processes that drive desired outcomes. In the absence of normal competitive markets, the Panel believes the best way to improve service within the rail-based logistics system is by fostering commercial processes that encourage bilateral negotiations between parties with more balanced negotiating power. If relationships are balanced and effective processes are in place, then negotiations should produce results similar to those expected in a normal competitive market. The results should also reflect the unique commercial needs of the two parties. The Panel is wary of prescriptive regulatory solutions that focus on outcomes and are based on a one-size-fits-all approach that could lack flexibility and stifle innovation.

A number of stakeholders supported regulated performance standards, penalties and/or monitoring. The Panel believes this type of outcome-based oversight is not the right approach. It prefers, instead to create an environment (either commercial or regulatory) that fosters bilateral solutions. Further, a regulated approach to these solutions raises a number of challenging issues – such as who would set the standards and penalties and on what basis? In addition, the Panel is concerned that a broad-based approach would lack the flexibility required for stakeholders to address individual circumstances. An inflexible regulatory approach that prescribed solutions could inadvertently favour one side, discourage normal negotiations, and lead to unsatisfactory results. Finally, there are potentially significant administrative costs associated with a scheme of standards and penalties. Indeed, shippers have complained bitterly about the administrative cost of dealing with railway demurrage charges. A regulated system of general penalty charges levied against the railways would likely result in a similar administrative burden. The Panel is also concerned that sorting out these issues would cause unacceptable delays in implementing its key recommendations.

On the other hand, an approach based on bilateral negotiations between parties with more balanced negotiating power would allow the parties to take into consideration their unique circumstances. The parties could decide what standards and penalties, if any, are appropriate. They could also agree on appropriate reporting requirements, which would significantly reduce, if not eliminate, the need for a costly and bureaucratic monitor's office.

In the absence of a normal functioning commercial market, the Panel believes its recommendations will encourage more balanced, bilateral processes (either commercial or regulated) to drive outcomes that improve rail service.

## 5.7 OTHER CONSIDERATIONS

### CN versus CP

During the consultations, many stakeholders commented that CN was generally more aggressive than CP in pursuing financial objectives, including cost-cutting and other efficiency measures. In addition, many shippers advised the Panel that CP was more responsive to stakeholder concerns and that this often mitigated impacts related to service issues. That being said, stakeholders have commented to the Panel that CN, out of necessity, has taken bigger steps to address rail service problems in recent months. The Panel believes that any regulatory remedy cannot be directed at one railway, but must apply equally to all federal railways.

### Federal jurisdiction

The federal government clearly has the statutory authority to regulate federal railways. It does not necessarily have the authority to impose statutory obligations on all other stakeholders within the rail-based logistics system. This is a consideration in developing potential regulatory solutions that may extend to other stakeholders in the rail-based logistics chain.

### Railway tools

In addition to their market power, the railways have commercial tools to influence the behaviour of others. Railways have the statutory right to issue a schedule of rates, charges, terms and conditions applicable to the movement of traffic and ancillary charges to recover costs for services provided. For example, the ability to charge demurrage encourages shippers and receivers to load and unload rail cars as quickly as possible. This helps to reduce railway costs and improve system efficiencies, if properly administered. The ability of other stakeholders to encourage good railway performance, or conversely discourage bad performance, is more constrained. The fact that only railways have this ability to to affect customer behaviour or deal with cost pressures for services provided reduces the need to influence the behaviour of other stakeholders in the rail-based supply chain.

### Level of Service Obligations

Several stakeholders asked that the Panel recommend strengthening the current LOS provisions, including clarifying and defining adequate and suitable accommodation and addressing systemic rail service issues. The Panel took the view that bilateral approaches established in service agreements, along with a more effective dispute resolution process, were more appropriate mechanisms to address these issues.

### Transparency

As a general principle, the Panel supports more transparency through more information-sharing within the rail-based logistics system. A better exchange of information should help stakeholders identify problems and facilitate solutions. It should also result in better operational decisions and increase the overall efficiency and reliability of the system.

### Dispute resolution

As noted earlier, the rail-based supply chain is a complex system that involves daily decisions and interactions by a wide-range of industry stakeholders. It is inevitable that disputes will arise. It is in everyone's best interest to develop dispute resolution processes that are fair, timely and low-cost.

### Railway resource levels

As discussed earlier, many stakeholders believe that the railways use their market power to manage service supply by limiting their overall resource levels and reducing capacity at times throughout the year, for example during slow periods when they park more cars than may be warranted. This is a very difficult issue to assess. However, the Panel expects this issue can be resolved by rebalancing the relationship between railways and shippers and improving transparency regarding stakeholder performance.

### Administrative burden

A number of stakeholders raised concerns about the administrative burden of existing processes, such as the railways' billing systems. The railways have indicated they are trying to address this particular issue. It is important to the Panel that administrative costs and bureaucracy be minimized in considering options to address service issues. The rail-based logistics system is and will remain fundamentally a commercial system. Stakeholders need the flexibility to adjust to changing circumstances and should not be unnecessarily restricted by ineffective bureaucratic rules and red tape.

### Relationships

It is understood that railways and shippers often have differences of opinion because they come at issues from different perspectives. However, the Panel was struck by how significant the gap is and how it is straining relationships, likely to the detriment of overall system performance. The Panel sees this as a very important issue and recognizes that it will take time to build the trust and confidence that are essential to maintaining effective relationships. The Panel strongly encourages that both sides continue to address this issue and hopes that its recommendations are helpful in this regard.

### Shipper size and location

Small shippers and shippers located on branch lines may sometimes be at a disadvantage with respect to those that ship high volumes and/or are located on railway main-lines. The Panel is sensitive to the needs of small shippers and shippers on branch lines and took their needs into consideration in developing its recommendations.

## 5.8 CONCLUSION: THE NEED FOR CHANGE

The Panel has concluded that there were significant service problems within the system during the two-year study period examined in the Phase I work. Although the railways have taken steps to address service issues, problems still remain. Service problems affect not only individual shippers but also particular sectors and regions of the country. Indeed, problems with the rail-based logistics system can affect the overall performance of the Canadian economy by reducing efficiencies and creating uncertainty about the system's ability to reliably deliver goods to and from continental and international markets on a timely and effective basis. Such doubts can result in lost sales opportunities or the need to discount prices for Canadian goods in order to offset logistics risks.

Moreover, the Panel also concludes that many, but certainly not all, of the problems relate to the performance of CN and CP.

These conclusions are based on its assessment of the QGI analytical reports in the Phase I research program which, in the Panel's view, clearly demonstrate service problems during the 2006-2008 period. The NRG shipper survey also concluded there was a very low level of satisfaction with rail service.

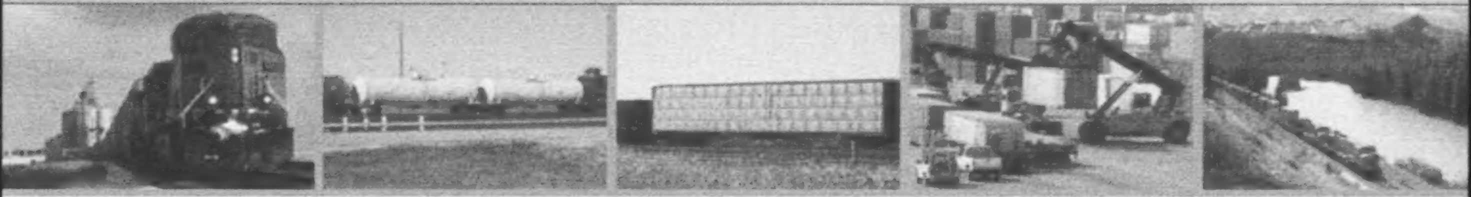
The Panel also considered the comments contained in stakeholder submissions and those received during the various site visits and consultation sessions with stakeholders. There were complaints from a broad cross-section of stakeholders about a wide range of railway services issues, as discussed in Chapter 4.

As well, the Panel has considered comments received from stakeholders in their reaction to the Panel's Interim Report.

Finally, the Panel considered the railways' recent initiatives to improve service, as well as comments from non-railway stakeholders that rail service improvements need to be sustainable, as an acknowledgement that changes in the relationships between railways and their stakeholders are warranted.

> *"CN acknowledges that there are a number of areas ripe for improvement in its service offering, in particular at the first and last legs of traffic movements, which are the ultimate customer touch points."*
>
> **April 30, 2010, CN's submission to the Panel, page 2.**

# CHAPTER 6



## 6. KEY RECOMMENDATIONS

### 6.1 INTRODUCTION

In developing its final recommendations to address problems and issues with respect to railway service, including those stemming from other elements of the logistics system, the Panel carefully considered and evaluated all issues, impacts and proposed solutions raised by stakeholders, as well as the findings of the Phase I research, the feedback on the Interim Report, the considerations as set out in Chapter 5 and the railways' commitment letters.[22]

This chapter contains the Panel's recommendations related to the key issues set out in Chapter 4, while Chapter 7 discusses other issues in the context of the Panel's mandate.

The Panel's mandate is to make recommendations that provide commercial and, if necessary, regulatory solutions to address railway service issues within the rail-based logistics chain, with a focus on service provided by CN and CP. The Panel believes its mandate gives it fairly broad discretion in developing its recommendations. In principle, the Panel believes commercial solutions will address issues and problems better than increased regulation. However, the Panel also recognizes that effective legislation and regulation may be necessary to foster an environment that encourages commercial solutions to service problems and disputes.

In its Interim Report, the Panel developed a general approach that emphasized commercial solutions, but provided for a regulatory fallback in the event commercial solutions did not result in adequate service. The Panel continues to recommend this general approach, with some modifications. The Panel's recommendations are based on the following conclusions:

- The rail-based logistics system, as documented in the Phase I results and reflected in stakeholder comments, has gone through a period during which rail service was less than adequate.
- While some of the service issues are attributable to non-railway stakeholders (these include poor forecasting and port and terminal congestion), most of the issues raised relate to railway behaviour. The Panel encourages more customer-centric behaviour by the railways, either commercially or through regulation.
- There are no practical ways to directly increase rail competition.
- The railways have commenced a number of initiatives, which are generating service improvements to railway customers. These should continue.
- While there have been some positive results to date from the railways' initiatives, continued improvement in rail service is required, and these changes need to be lasting. It will take some time for the railway initiatives to be fully implemented and for the benefits to be fully achieved.

---

[22] In the Interim Report, the Panel described its preferred approach to resolving issues and asked the railways to provide a written commitment to the Panel that specifically addressed the commercial recommendations. See Appendices M and N.

- When railways consult/negotiate with their stakeholders to implement their initiatives, they have an opportunity to address adverse impacts on rail service attributable to the behaviour of other stakeholders. Because of a relative lack of market power, many other stakeholders do not have this same opportunity.
- The Panel believes that at some point, there should be an assessment to determine whether or not the government should proceed with drafting and implementing legislation. The Panel is not unanimous as to when and how this assessment should be conducted as explained in section 6.6 (Implementation of Legislation).
- The Panel believes that the commercial measures and, if necessary, the regulatory measures that are being recommended will rebalance relationships between railways and their stakeholders.

*The Panel's recommendations form a comprehensive package* ***aimed at rebalancing the relationship between the railways and other stakeholders****, in particular shippers. The Panel believes improving shippers' leverage with the railways is the best way to achieve results that more closely resemble those that would be expected from competitive markets. This should lead to a more effective, accountable, and reliable rail-based logistics system.*

The Panel's recommendations contain the following four key elements:

- notification of service changes;
- implementation of service agreements;
- establishment of a fair and balanced dispute resolution process; and
- enhanced performance reporting.

The principles underlying the key elements are described in the Panel's commercial approach below.

The recommendations will require additional changes by the railways, over and above those they are implementing. The Panel notes that the railways expressed considerable concern during previous legislative reforms when concepts such as final offer arbitration and competitive line rates were introduced. As it turned out, the impacts on the railways from these provisions have been manageable. The Panel is confident that the railways will also be able to manage impacts from the changes recommended herein.

## 6.2 GENERAL APPROACH

The Panel is recommending a two-phased strategy to address service issues – a commercial approach, to be followed by an assessment and, if necessary, by the implementation of regulatory remedies. In so doing, the Panel acknowledges the railways' recent efforts to address service issues. Non-railway stakeholders have generally indicated that communications are more frequent, that there is a renewed willingness to cooperate, and that rail service is improving in some sectors.

The Panel believes the commercial measures need to be pursued through cooperation of all participants in the rail-based logistics system, with a common goal of continuous improvement in the supply chain. To this end, the Panel is recommending that facilitators be appointed by the government to help stakeholders negotiate some of the details of the commercial approach and report back upon completion of their processes.

The Panel has identified a number of additional complementary measures, over and above the railways' initiatives, to improve service within the rail-based logistics system.

Since many non-railway stakeholders were skeptical about the commercial approach without a regulatory backstop in place, the Panel requested, in the Interim Report, that the railways provide a written commitment to the Panel that would specifically address the Panel's recommendations identified in the commercial phase section. Commitment letters were received. See Appendices M (CN) and N (CP).

The Panel urges the government, should it accept its recommendations, to send a strong signal that it expects stakeholders to work together in good faith to develop the details of the commercial approach. The Panel urges the government to consider the willingness of parties to work in good faith when it decides whether or not to proceed with implementation of legislation after the proposed assessments of the reports of the facilitators.

The Panel notes that the existing shipper protection provisions of the CTA will remain in place and will be available to shippers who wish to use them.

## 6.3 THE RAILWAY COMMITMENT LETTERS

As noted above, the success of the Panel's commercial approach contained in the Interim Report would be dependent to a large extent on a commitment from both railways to implement the Panel's recommendations identified in the commercial approach section.

In this regard, the Panel asked the railways to provide commitment letters, and held discussions with both to deal with concerns and potential "gaps" in their original replies. Although this process did not result in the full commitment the Panel would have preferred, both railways have made significant commitments towards implementing the commercial package proposed by the Panel. On this basis, the Panel is encouraged that a commercial solution is possible, and therefore maintains its two-step approach. It is intended that the facilitation processes will address the railways' concerns to the mutual satisfaction of all parties. However, the Panel took the possibility of failure into consideration in developing its final recommendations.

The railways' concerns related to the commitment letters, and the Panel's response to these concerns are addressed in the proposed regulatory dispute resolution process. Refer to section 6.5.3 (Regulated Dispute Resolution Process).

## 6.4 COMMERCIAL APPROACH

The Rail Freight Service Review Panel recommends four key elements that should be implemented commercially to complement current railway initiatives. The Panel's recommendations would be implemented by the railways in collaboration with supply- chain stakeholders. These recommendations are largely unchanged from the Interim Report.

**Recommendation 1**

The Panel recommends that railways, in collaboration with their stakeholders, continue to develop commercial measures to improve rail service. These commercial initiatives would include the four key elements related to service changes, service agreements, dispute resolution and enhanced reporting.

### 6.4.1 NOTIFICATION OF SERVICE CHANGES

Prior to implementing changes in local train service from established practice, the Panel encourages the railways to commit voluntarily to a minimum notice period of 10 working days in order to provide a minimum period for stakeholders to raise any comments or concerns with the proposed change. The Panel encourages the railways to include this notification commitment in appropriate tariffs.

In addition, the Panel believes the railways should commit to resolving disputes related to the changed service through an appropriate dispute resolution process such as the one described in section 6.4.3.

Some stakeholders commented that 10 days may not be sufficient, particularly if capital or labour changes are required to accommodate the new service. The Panel is satisfied these issues can be identified within the 10 days and suitable short-term solutions agreed upon, particularly given the stakeholders' access to commercial dispute resolution.

Notice should be provided to those stakeholders with operational and commercial relationships[23] with railways at locations that will be impacted by the proposed change in service. Notice should be subject to force majeure. The notice period would be subject to change only upon mutual consent.

**Recommendation 2**
Prior to implementing changes in local train service, railways should provide a minimum notification period of 10 working days. Railways should commit to resolving disputes related to the changed service through an appropriate dispute resolution mechanism such as the commercial process described in Recommendation 4.

**Based on feedback from the Interim Report, there is broad agreement in principle to provide improved notice of changes in rail service.**

***Rationale***

> *Changes in local service by the railways can have significant impacts on other stakeholders. The Panel believes that an appropriate notice of rail service change (to provide an opportunity to raise concerns), plus an effective mechanism to challenge such changes, would improve service within the rail-based logistics system and provide a reasonable opportunity for affected stakeholders to minimize adverse impacts.*

### 6.4.2 IMPLEMENTATION OF SERVICE AGREEMENTS

The Panel encourages the railways to negotiate service agreements at the request of stakeholders that have an operational or commercial relationship with them, including shippers, terminal operators, transloaders, short line railways and customers located on short line railways. Elements of service agreements may include:

- services and obligations of the railway and obligations of the other party;
- communication protocols and escalation;
- traffic volumes;
- key performance metrics;
- performance standards;
- consequences of non-performance (including penalties);
- dispute resolution; and
- force majeure.

For clarity, the Panel believes it is essential that disputes related to the initial establishment or renewal of service agreements, i.e. failure to reach agreement on the terms and conditions of service agreements or renewals, should be eligible for dispute resolution. Matters related to the terms and conditions of service that are covered explicitly in a confidential contract should not be eligible for inclusion in a service agreement. The Panel encourages the railways to work with groups such as small shippers to develop acceptable "boiler plate" service agreements that could be used as a basis for individual members of the group to negotiate respective service agreements reflective of their unique needs.

---

[23] Parties who load, receive, unload and interchange traffic would be deemed to have an operational relationship with the railways. Stakeholders who are party to a bill of lading would be regarded as having a commercial relationship with the railways.

**Recommendation 3**

Railways should enter into good faith negotiations to establish service agreements upon request by stakeholders who have an operational or commercial relationship with them, including the establishment of "boiler plate" agreements with groups, such as small shippers.

Disputes related to the initial establishment or renewal of service agreements, i.e. failure to reach agreement on the terms and conditions of service agreements or renewals, should be eligible for dispute resolution.

**Based on feedback from the Interim Report, there is broad support in principle for the concept of service agreements.**

*Rationale*

*The Panel believes that agreements between railways and other parties that describe roles, clarify responsibilities and contain service elements would strengthen the relationships and contribute to better service within the rail-based logistics system.*

### 6.4.3 ESTABLISHMENT OF A DISPUTE RESOLUTION PROCESS

The Panel encourages the railways to engage in negotiations on a commercial dispute resolution process with stakeholders, including shortlines and customers located on shortlines, with whom they have an operational or commercial relationship. The objective would be to establish a process that is fair and balanced, timely and low-cost and, therefore, would be more effective in resolving rail service disputes. The Panel recommends that, upon the release of the Panel's Final Report, the Minister appoint a facilitator to work with railways and interested stakeholders to develop mutually agreeable terms and conditions for a dispute resolution process.

The scope of the dispute resolution process should include disputes related to changes in local service and disputes related to the failure to establish or renew service agreements. The regulated dispute resolution process described in section 6.5.3 should be used as a guide for the facilitated negotiations.

The Panel recommends that the facilitation process be conducted over a maximum period of six months from appointment of a facilitator. Given the existing commercial dispute resolution models (CFI, CN and CP) plus the guidelines outlined in section 6.5.3, the Panel feels six months is enough time to determine the intent of the parties. One Panel member dissents and is of the opinion that there should be no time limit on the facilitation process. He believes setting a firm timeline in the absence of the 2013 assessment, as explained in section 6.6, greatly reduces the opportunity for a successful commercial resolution.

Additionally, the Panel recommends that the United States portion of cross-border traffic that originates/terminates in Canada on CP and CN lines and originates/terminates or is inter-lined from respective CP and CN lines in the United States be covered by this process, unless a Transport Canada review identifies legal or policy issues that cannot be overcome.

The Panel recommends that any agreement on a commercial dispute resolution process be filed with the Agency and include a provision for renewing or amending the agreement that is based on mutual consent or, if necessary, a facilitated process similar to the process used to establish the agreement.

**Recommendation 4**

The Panel recommends that railways, assisted by a facilitator appointed by Transport Canada, should engage in negotiations with stakeholders, including shortlines and customers located on shortline railways, with whom they have a commercial or operational relationship, on a fair and balanced commercial dispute resolution process. Parties should be given up to six months from appointment of a facilitator to reach an agreement.

The Panel recommends that the regulated dispute resolution process described in section 6.5.3 be used as a guide for the facilitated negotiations.

The Panel recommends that any agreement on a commercial dispute resolution process be filed with the Agency and include a provision for renewing or amending the agreement that is based on mutual consent or, if necessary, a facilitated process similar to the process used to establish the agreement.

**Note:** *One Panel member does not agree with the six-month time limit for the facilitation process. He believes setting a firm timeline in the absence of the 2013 assessment, as explained in section 6.6, greatly reduces the opportunity for a successful commercial resolution.*

**Based on feedback from the Interim Report there was broad support for this recommendation. However, CN and CP are opposed to including the resolution of disputes related to the establishment or renewal of service agreements in its scope. CN also opposes including disputes on changes to local service in the scope. The Panel comments on the railways' concerns in section 6.5.3.**

***Rationale***

> *The Panel believes that a dispute resolution process that is fair and balanced, timely and low-cost, can go a long way to addressing service issues within the rail-based logistics system and can immediately contribute to a rebalancing of relationships.*

### 6.4.4 ENHANCED PERFORMANCE REPORTING

The Panel encourages the railways and others, where applicable, to expand performance reporting at two levels: confidential bilateral reporting and public reporting at a sector level. Reporting at both levels should begin as soon as practical in order to increase the visibility of the supply chain and provide a basis for railways and their stakeholders to address service issues.

**Based on feedback from the Interim Report, there is strong stakeholder support for enhanced performance reporting. Most non-railway stakeholders believe that public and confidential bilateral reporting will be influential in tracking improvements to Canada's rail freight service. This will provide shippers with an additional tool to facilitate commercial discussions with the railways and provide for improved public policy decisions. The railways also believe enhanced performance reporting, especially confidential bilateral reporting, will lead to overall improvements in the logistics system.**

### *Confidential bilateral reporting*

The Panel encourages the railways to provide confidential performance measures, in real time, to individual shippers and receivers upon request. The railways should consult individual shippers and receivers to determine appropriate metrics ("scorecards," for example) to be reported.

**There is broad shipper and railway support for confidential bilateral reporting. CN has already taken steps to implement scorecards with its stakeholders and CP agrees to consult with customers, upon request, on confidential bilateral reporting.**

**Recommendation 5**

Railways should provide improved supply chain visibility through enhanced bilateral reporting. The Panel encourages railways to work with stakeholders to develop acceptable and meaningful reporting at a confidential bilateral level.

### *Public reporting at a sector level*

The Panel encourages the railways and others, where appropriate, to report publicly on aggregated sector-level metrics. Table 6 contains examples of the types of metrics to be considered for public reporting. Enhanced public performance reporting is aimed at providing better visibility to individual shippers to help them in their preparation for negotiations with the railways by comparing railway performance for their own traffic against average system and sector performance. More generally, it will also provide better information for addressing systemic service and other public policy issues. For example, general fleet information combined with aggregated shipper demand information may help determine whether the railways are providing reasonably consistent supply relative to sector demand. Aggregate data on first mile, car movements, and last mile will permit a sector-to-sector comparison and may lead to early identification of issues.

While focused on railways, public reporting should include metrics related to the performance of shippers and receivers at origin and destination as well as metrics related to terminal activities at port and inland terminals. The Panel notes that recent collaboration agreements between the railways and ports/terminals are a good step in this direction. These types of indicators are included in Table 6 and could be expanded upon if appropriate.

The Panel recommends that the metrics, including the frequency of reporting, be refined based on industry consultations led by a facilitator appointed by Transport Canada. The Panel encourages stakeholders to focus initially on a subset of the Table 6 list that would yield the quickest and most meaningful results and then build the list of metrics over time.

Public reporting metrics should be developed in a way that does not jeopardize the confidentiality of commercial information related to individual shippers/receivers or railways.

**CP indicated it was prepared to work with a facilitator appointed by Transport Canada in consultation with other stakeholders to develop a set of non-commercially sensitive metrics for public reporting. CN supports aggregated public reporting "of end-to-end supply chain performance metrics."**

Although both railways have committed to enhanced public reporting of non-confidential performance metrics, they have indicated in discussions with the Panel that any public reporting process that is established must provide a connection between the various parts of the logistics chain so that the focus is not exclusively on the railways. Some of the indicators in Table 6 report on the performance of shippers and receivers and, therefore, address the railways' concerns about connections between different parts of the system. Furthermore, the Panel is confident that facilitator-led discussions on public reporting will provide an opportunity to discuss and resolve this and other stakeholder issues that arise.

Some stakeholders expressed concern about the reliability of railway data that would be used for much of the performance reporting if responsibility for the public reporting was assigned to the railways. The Panel believes that the issue of the reliability of data, regardless of the source, can be addressed through the proposed facilitator-led consultations on performance reporting.

The ability of existing stakeholder data/information systems to provide the type of information that is required, especially the railways' systems, will need to be addressed during the consultative process.

**Table 6: Representative Performance Indicators Public Reporting by Major Car Type, Sector and Region**

| System Component | Performance Measure |
|---|---|
| **General Fleet Information**<br>(Weekly reporting) | Number of active cars (including private fleet)<br>Number of cars off-line<br>Number of cars in long-term storage<br>Number of bad order cars |
| ***First Mile***<br><br>Order fulfillment by day/week<br>(Monthly/quarterly reporting) | Cars ordered and percent of orders (cars) changed by customer<br>Cars confirmed<br>Cars delivered<br>Cars released loaded<br>Origin switching performance (% on time) |
| **Car Movements**<br>From origin to destination<br>(Monthly/quarterly reporting) | Loaded car cycle times<br>Variances to ETAs in average days<br>Empty car cycle times (where applicable)<br>Dwell times at origin (loaded and empty)<br>Dwell times at destination (loaded and empty) |
| ***Last Mile***<br><br>Destination service<br>(Monthly/quarterly reporting) | Container dwell times (terminal/ports to provide)<br>Percent of cars where there is no constructive placement or hold<br>Destination switching (% on time)<br>On-time releases (% of cars)<br>Empty pull (% on time)<br>Performance of cars ordered in (if available) |

The Panel recommends that the facilitation process focus on initial reporting parameters that would yield the quickest and most meaningful results and be conducted over a maximum period of six months after appointment of a facilitator. It should be noted that one Panel member does not agree with the six-month time limit for the facilitation process. He believes setting a firm timeline in the absence of the 2013 assessment, as explained in section 6.6, greatly reduces the opportunity for a commercial resolution.

**Recommendation 6**

The Panel recommends Transport Canada appoint a facilitator to consult with railways and their stakeholders to develop acceptable and meaningful public reporting on non-commercially sensitive metrics at a sector level. Parties should be given up to six months after appointment of a facilitator to arrive at an agreement on a core set of metrics.

**Note:** *One Panel member does not agree with the six-month time limit for the facilitation process. He believes setting a firm timeline in the absence of the 2013 assessment, as explained in section 6.6, greatly reduces the opportunity for a commercial resolution.*

***Rationale***

*The Panel believes that enhanced performance reporting will provide better visibility of the supply chain and can help improve accountability and service within the rail-based logistics system. Providing better information to stakeholders will help to identify problems and solutions.*

### 6.4.5 SUSTAINABILITY

As previously mentioned, the Panel's recommendations form a comprehensive package that provide significant new tools aimed at rebalancing the relationship between the railways and other stakeholders, especially shippers. The Panel believes the package is sustainable on a commercial basis, provided the four key elements are implemented and remain in place over the long term and further provided that all parties continue to work cooperatively in the interests of the overall system.

The Panel notes that enhanced reporting on an on-going basis will help stakeholders assess whether improvements are taking place, both at the bilateral shipper-railway level and an aggregated "public" level. The Panel also recommends that the 2015 statutory CTA review confirm whether or not the framework is achieving the desired results or if there are unintended consequences. Consideration could be given to including similar confirmations in subsequent statutory reviews.

If the key elements are successfully implemented on a commercial basis, the Panel believes it will be difficult for the railways to withdraw or weaken their commitment, a concern that many stakeholders have raised. Based on:

1. the fact that the government determined there was a need for the Review;
2. the Panel's conclusion that there was a problem with service that needed to be addressed; and
3. the Panel's specific recommendations on how to address the problem;

the Panel believes the level of both industry and public expectations regarding railway service has been raised and it will be difficult for rail service to deteriorate without attracting significant attention. Indeed, the Panel believes that its conclusions and recommendations should be a benchmark during the Panel's proposed confirmation of results to be conducted as part of the 2015 review of the CTA and potentially subsequent reviews, ensuring that the bar remains at a high level over the long term.

## 6.5 RECOMMENDED REGULATORY FALLBACK PROVISIONS

The Panel's recommendations for the regulatory "fallback" provisions are based on the same principles underlying the four key elements from the commercial approach section (Section 6.4).

### 6.5.1 Notification of Service Changes

- Railways shall be required to provide in their ancillary tariffs, a minimum notice of 10 working days regarding changes to service.
- Service changes would be defined as changes to local train service from established practice.
- Notice is to be provided to those stakeholders with operational and commercial relationships with railways at locations that will be impacted by the proposed change in service.
- Service change can only be implemented within the notice period by mutual consent.
- Obligation to provide notice is to be subject to force majeure.
- Any disputes arising from the proposed change in service shall be subject to the regulatory dispute resolution process described in section 6.5.3.

### 6.5.2 Implementation of Service Agreements

- Stakeholders who have an operational or commercial relationship with railways shall have a statutory right to a service agreement with the railway.
- Elements of service agreements include:
    - services and obligations of the railway and obligations of the other party;
    - communication protocols and escalation;
    - traffic volumes;
    - key performance metrics;
    - performance standards;
    - consequences of non-performance (including penalties);
    - dispute resolution; and
    - force majeure.
- If parties cannot reach a commercial agreement, either party can refer the matter to the dispute resolution process described in section 6.5.3.
- Terms and conditions of service covered explicitly in a confidential contract shall not be eligible for inclusion in a regulated service agreement.
- The government should consult stakeholders prior to developing regulations to implement the details of this recommendation.

### 6.5.3 REGULATED DISPUTE RESOLUTION PROCESS

The Panel has made a number of refinements to the proposed regulated dispute resolution process relative to that contained in the Interim Report. These refinements stem largely from concerns raised by the railways, during discussions on their commitment letters, about the commercial dispute resolution process.

The railways raised two main concerns. The first was that the dispute resolution process did not take into consideration the relationship between rates and service and, therefore, could result in arbitration decisions that are unfair or impractical. It is the Panel's intent that other terms and conditions applying to the traffic in question would be considered in service decisions made by the arbitrator. This has been clarified in the proposed new process.

The second concern the railways raised related to the consistency and quality of arbitrator decisions on the establishment of service agreements, particularly in a short-form final offer arbitration environment, and given the importance of the agreements in determining the relationship between the parties. To address this concern, the Panel is recommending that the Agency be the arbitrator under the regulated dispute resolution process, given its experience and knowledge. The Panel is also recommending mandatory mediation as a means to address this concern.

**Principles:**

The principles of the Panel's regulated dispute resolution process are as follows:

- Stakeholders, including shortlines and customers located on short line railways, that have an operational or commercial relationship with federally regulated Class I railways, shall have access to a regulated dispute resolution process.
- Once stakeholders have applied to the Agency to use the regulatory dispute resolution process, they waive the right to access other shipper protection provisions in the CTA for that specific dispute.
- The proposed new approach is a combined mediation-arbitration process.
- The mediator-arbitrator will be the same person.
- The mediator-arbitrator (there may be more than one per case) will be appointed by the Agency and will be either a member, an official or a third party, with experience in rail transportation, retained by the Agency and approved by the parties.
- The arbitration portion shall be final offer, binding, and non-appealable.
- The process applies to disputes regarding all service issues including:
  - establishment of initial service agreements, including renewals;
  - existing service agreements; and
  - service changes.
- As guidance, the mediator/arbitrator shall consider other existing transportation agreements/ arrangements (including confidential rate contracts, tariffs, etc.) between the two parties.
- Final decisions must be rendered by the mediator/ arbitrator within 45 day for disputes arising from the establishment of initial agreements and renewals and 21 days for all other disputes.
- Reasons for the arbitrator's decision are to be provided only upon mutual consent of the parties, but are to remain confidential.
- There is to be no ability to award damages as part of the dispute resolution process.
- Parties are to be advised simultaneously of the arbitrator's decision.
- The Agency is to publish a non-confidential high-level summary of arbitration decisions in its annual report. To this end, the arbitrator is to provide a non-confidential summary of the decision to the Agency within 14 days of advising the parties.

- The Panel recommends that the United States portion of cross-border traffic that originates/terminates in Canada on CP and CN lines and originates/terminates or is inter-lined from respective CP and CN lines in the United States be covered by this process, unless the Transport Canada review identifies legal or policy issues that cannot be overcome.

**Steps and timing:**

1. Stakeholder provides five-day notice of intent to file for mediation-arbitration process.
2. Stakeholder triggers the process by filing a dispute with the Agency and the other party. Stakeholder provides summary information outlining the nature of the dispute.
3. Agency appoints, as soon as possible, mediator/arbitrator (clock starts).
4. Parties have seven days to exchange offers.
5. Mediator holds a pre-mediation conference to establish procedures and schedule.
6. Mandatory mediation – maximum of two days.
7. If mediation fails, parties move to final offer arbitration.
8. Parties are given the opportunity to revise and exchange their offers (maximum of two days).
9. Arbitrator holds a pre-arbitration conference to establish procedures and schedule.
10. The arbitration process proceeds in accordance with the established procedures and schedule.
11. Arbitrator issues decision.

Amendments to the CTA should be made to authorize the Governor in Council to establish terms and conditions for the regulatory dispute resolution process. Stakeholders should be consulted before finalizing the details of the regulations.

The Panel believes final offer is a very effective form of arbitration since it provides an incentive for both sides to compromise or face the risk of losing the arbitration. This Agency process should also mitigate the railways' concerns regarding the quality and consistency of decisions. In addition, the Panel believes final offer arbitration will provide incentive for negotiated resolution of disputes before the arbitrator has made a decision.

### 6.5.4 ENHANCED PERFORMANCE REPORTING

Recommendations on bilateral and sector level reporting by railways are to be implemented through legislation/regulation after consultations with stakeholders. Enhanced performance reporting is aimed at providing better visibility to individual shippers to help them prepare for negotiations with the railways. It will also provide better information for addressing systemic service and other public policy issues. The description of enhanced performance reporting contained in section 6.4.4 should be used as a guide in developing the legislation and regulations.

**Confidential bilateral reporting**

The railways shall, upon request, provide confidential performance measures, in real time, to individual shippers and receivers.

Railways shall consult shippers and receivers to determine appropriate metrics ("scorecards," for example) to be reported on.

**Public reporting at a sector level**

Railways shall report on aggregated metrics at a sector level. Table 6 contains examples of the types of metrics for public reporting. The Panel recommends that the metrics be refined based on industry consultations.

## 6.6 IMPLEMENTATION OF LEGISLATION

Based on the railways' commitment letters and comments provided by stakeholders following release of the Interim Report, the Panel has revised its recommendation regarding the implementation of legislation. The Panel no longer recommends the pre-drafting of enabling legislation (i.e. legislation that could be implemented at some point in the future) or a 2013 assessment.

As noted earlier in the report, the Panel believes that the implementation of its four core elements commercially will help rebalance the relationship between other stakeholders and the railways and provide non-railway stakeholders with the necessary tools to deal with railway service issues. This, in turn, will lead to improved service. The Panel believes that the continued existence and use of these tools will address stakeholder concerns about the sustainability of the commercial approach over the long term. (Reference section 6.4.5.)

It is the Panel's opinion that the commercial solutions stand or fail as a package. Given good faith participation in the facilitation process, the Panel believes failure to achieve consensus on either of the two facilitated recommendations would be fatal to the commercial package, and would raise serious questions regarding its sustainability. Legislation may therefore be warranted.

A key element of the Panel's commercial package where the railways' commitment letters are deficient relates to dispute resolution regarding failure to agree on new service agreements or renewals. The Panel believes that balance in negotiating service agreements can only be achieved if there is a fair and reasonable dispute resolution process. Without balanced service agreements, the Panel's commercial process would not be effective.

The railways' commitment letters are also ambiguous on the issue of public sector reporting. Subject to addressing issues related to commercial sensitivity, the Panel views public sector reporting as important to sustaining and maintaining continuous improvement in supply chain performance. The Panel has included in Table 6 many measures that reflect the performance of other stakeholders in addition to the railways. Still the railways expressed some reluctance during discussions with the Panel. The Panel believes a facilitated process could quickly achieve progress in this area if there is a commitment from both sides. Failure may raise questions about whether the Panel's objectives are achievable without legislation.

The mandate for the 2013 assessment, as outlined in the Interim Report, included a quantitative assessment of key performance indicators. However, the Panel believes there would not be sufficient time to agree on and implement measurement parameters between the release of the Panel's Final Report and the 2013 assessment to provide a reasonably representative quantitative picture. In addition, such a short time frame may generate skewed results one way or the other that could bias a decision. Finally, the Panel believes its recommendations depend on processes to drive outcomes. Without the processes included in the commercial package, short-term outcomes do nothing to ensure sustainability.

The Panel recommends the Minister determine whether or not to implement legislation based on the reports of the facilitators assigned to work with industry stakeholders on the issues of commercial dispute resolution and enhanced performance reporting. As noted earlier, it is recommended the facilitators submit reports to the Minister at the end of the facilitation processes. These reports should confirm that each respective process has been successful or that there are key issues that cannot be resolved. In the latter case, when drafting an opinion regarding why key issues have not been resolved, the facilitator shall consider whether there were legitimate differences of opinion, whether the parties participated in good faith, and all other relevant factors.

The report should also include the facilitator's opinion on whether some or all of the proposed legislative provisions should proceed. In this event, the Panel recommends that the Minister proceed immediately, upon receipt of the facilitator's report, with the drafting of legislation based on all or part of the legislative recommendations contained in section 6.5. If the Minister decides that legislation is necessary, the Panel recommends that it be drafted and implemented expeditiously. The Panel understands that the Minister may recommend that legislation be drafted at any time if the Minister is of the view that it is necessary.

In view of this revised approach, the Panel no longer recommends an assessment be conducted in 2013.

**Recommendation 7**

The Panel recommends that the Minister implement legislation based on the reports of the facilitators assigned to work with industry stakeholders on the issues of commercial dispute resolution and enhanced performance reporting. If the government proceeds with legislation, the legislation should be based on all or a portion of the regulatory provisions in section 6.5 based on the Minister's views of what is required.

**Note:** *One Panel member does not concur with the recommendation regarding possible legislative drafting and implementation following a facilitator's report.* **In his view, an assessment should be conducted in 2013 as recommended in the Interim Report before any decisions are taken on drafting legislation.** *He is concerned that the new recommendation on legislation will be a disincentive for many stakeholders, particularly shippers, to enter into meaningful negotiations during the facilitation process. He is concerned that, given the tight timeframes for the facilitated discussions, a decision based only on the reports from the facilitators may not provide sufficient time to test the effectiveness of the commercial approach. He also sees the movement away from the 2013 assessment as a means of placating concerns about the enabling legislation approach and responding to pressures from the shipper associations for immediate legislation. Furthermore, he believes it is unfair and inappropriate for the government to make a decision to implement legislation simply on the basis that one or both of the facilitation processes fail. In his view, the decision should also take into consideration other factors identified in the Interim Report, such as an assessment of the railways' initiatives and commitments to the Panel, a quantitative assessment of key performance indicators, stakeholder consultations, and an assessment of stakeholder behaviour in commercial negotiations over and above their behaviour in the facilitation processes. A more complete description of the Interim Report's proposed framework for the 2013 assessment from the Interim Report is contained in Appendix P. This Panel member recommends that there be an assessment in 2013 and that the person or persons leading the 2013 assessment be mandated to assess whether commercial solutions were successful in achieving adequate railway service, and if not, recommend to the Minister whether regulatory changes should be drafted and implemented.*

The Panel further recommends that, as part of the 2015 statutory review of the CTA, a review be conducted to determine the effectiveness of the current framework and to see whether there have been unintended consequences, regardless of whether it is the commercial approach or a regulated one.

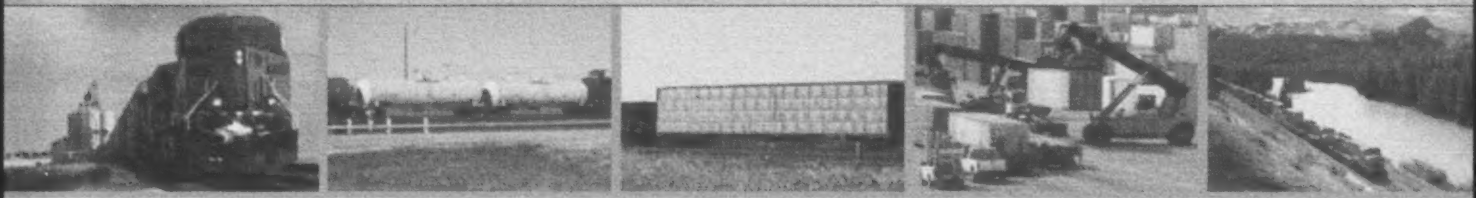
**Recommendation 8**
The Panel recommends that the 2015 statutory review of the *Canada Transportation Act* include an assessment of the effectiveness of the rail service framework and an evaluation of whether there have been unintended consequences, regardless of whether the framework it is based on is the Panel's proposed commercial approach or its proposed regulated approach.

## 6.7 IMPLEMENTATION OF THE PANEL'S RECOMMENDATIONS

The Panel recommends that the government develop a strategy to implement the recommendations, in particular an approach to the proposed consultations with industry stakeholders regarding the establishment of the dispute resolution and enhanced performance reporting recommendations for both the commercial and regulatory fallback situations.

The recommendations outlined in the section 6.5 entitled *Recommended Regulatory Fallback Provisions* plus the detailed proposals for enhanced performance reporting contained in section 6.4.4 would form the basis for consultations and drafting instructions in the event the government decided to proceed with legislation.

# CHAPTER 7



## 7. OTHER ISSUES IDENTIFIED BY NON-RAILWAY STAKEHOLDERS

Throughout both rounds of submissions, stakeholders raised a number of issues beyond the key ones discussed in Chapter 6. In this chapter, the Panel discusses these other issues and proposed solutions in two parts – those which fell within the Panel's mandate and those considered outside the mandate.

## 7.1 OTHER ISSUES WITHIN THE PANEL'S MANDATE

Other issues raised by stakeholders and falling within the Panel's mandate include:

- Shortlines;
- Producer car loading sites; and
- Stakeholders' knowledge of current CTA provisions.

### Shortlines

The terms of reference required the Panel "to examine the relationship between shortlines and main-line railways to determine whether any rail service problems being experienced by shortline shippers are attributable to service, operating, or marketing practices of the main-line carriers." The original 141 submissions from stakholders did not distinguish between service provided by shortlines versus main-line carriers. Furthermore, the Panel received very few submissions from shortline railways regarding shortline/main-line relations. Those submissions indicated most problems arise when the Class I railways fail to move rail cars from their yards to interchange with shortlines when scheduled. Other main-line/shortlines issues raised included car supply, high levels of rejected cars (poor condition), poor communications with respect to changes in service, and poor coordination and cooperation by the Class I railways. There was also a discussion of shortline issues related to line abandonment and producer cars.

Due to the relative lack of responses on the initial submissions, the Panel encouraged stakeholders to provide further comments, if any, regarding the relationship between shortline and main-line railways and the impact on customer service in their submissions on the Interim Report. In response to the Interim Report, the Panel received no submissions from shortline railways and only a few comments pertaining to shortlines. These comments were on sharing system-wide revenues, the revenue cap and producer car loading sites.

- *Given the lack of feedback on shortlines issues, the Panel feels it does not have sufficient information to determine whether there are service issues affecting shippers on shortlines that warrant more specific comments or recommendations, beyond those provided in the preceding chapters.*

### Producer car loading sites

Some stakeholders raised producer car loading sites as an important issue. More specifically, these stakeholders were concerned with the delisting of specific sites and the failure of the railways to negotiate these closures with the loading site users.

Solutions proposed by non-railway stakeholders include implementing a moratorium on closures, regulating closures and abandonment protection similar to those for urban sidings, establishing site standards, encouraging greater use of producer cars, and creating an agency to monitor practices related to producer cars and to resolve any related disputes. A few comments contained in stakeholder submissions on the Interim Report called for a study on the role of producer cars and public loading sites, and recommended the Panel support Bill C-586, which proposes a new procedure to be followed by railway companies seeking to close railway sidings used to load producer cars.

- *The Panel recognizes that producer cars and loading sites are very important issues for producers. The Panel is aware that the current legislation exempts the closure of sidings and spurs from the legislated discontinuance process for railway lines. The Panel notes that the railways are required to keep a list of producer car sites on their website and are required to give a public 60-day notice before closing any sites.*
- *The Panel notes that the railways' justification for closing producer car-loading sites is lack of use and that the most effective way to ensure that loading sites are retained is for producers to use the sites on a continuous basis with a reasonable volume of cars.*
- *The Panel also notes the closure of producer car sites can be challenged using the LOS provisions of the CTA.*
- *The Panel encourages the railways to work more closely with affected producer car interests regarding plans to close producer car loading sites.*

### Stakeholders' knowledge of CTA provisions

Throughout the course of the review process, it has become apparent that many stakeholders are not very well informed of the CTA provisions. The NRG shippers survey revealed that over half of the respondents (57 percent) had little or no familiarity with the CTA. From stakeholder submissions and consultation meetings, it also became apparent that many stakeholders are unfamiliar with the LOS and FOA remedies within the CTA.

- *Although commentary on this recommendation was minimal in submissions on the Interim Report, the Panel encourages respective shipper associations and the Agency to promote CTA awareness sessions and provide or improve plain language summaries on websites so stakeholders can have a better understanding of options for dispute resolution, procedures related to the LOS and FOA remedies and, a general understanding of the various processes, including timelines and resources required to pursue these remedies.*

## 7.2 OTHER ISSUES BEYOND THE PANEL'S MANDATE

Stakeholders raised a number of issues that the Panel considers to be beyond its mandate. These include:

**Rates**

- Revenue cap
- Freight rates
- Ancillary charges
- Competitive access rates

**Infrastructure**

- Branch lines
- Other infrastructure

**Labour-related**

- 24/7 Operations
- Loading in inclement weather
- Essential services
- Port and rail labour

**Other**

- CN WorldWide
- Comprehensive review of the CTA
- Port of Churchill
- Canadian Wheat Board role in transportation

The nature of the issues raised and Panel's comments are provided below.

### Rates

#### *Revenue cap*

Some stakeholders believe railways are earning excessive revenues from the regulated movement of western Canadian grain. They are proposing that a costing review be conducted to bring revenues into line with levels under the former *Western Grain Transportation Act*. The Panel was also asked to consider the impact of the rail revenue cap on the level of service for producers; recognize the deficiencies in the current revenue cap calculations; and determine if the railways are currently being paid for maintaining producer car loading sites under the revenue cap. It was also suggested that a review of the regulations regarding the rail revenue cap be conducted to assess possible alternative rate measures that could be adopted.

#### *Freight rates*

Non-railway stakeholders argue that the lack of rail competition allows the railways to charge uncompetitive and unfair freight rates and leaves shippers with little room to negotiate rates. Shippers add that rates are generally high, inconsistent and regularly increase at a level greater than the rate of inflation even during periods of economic slowdown, without a corresponding improvement in service.

#### *Ancillary charges*

Ancillary charges are charges/fees set out in railway tariffs for supplemental railway services other than for the hauling of freight. Examples include charges for demurrage, cleaning cars, storing cars, weighing product, special spotting requirements, rejected loads, equipment furnished but not used, and private car movements to or from maintenance shops.

Similar to the concerns raised regarding the application of demurrage charges, non-railway stakeholders also raised issues with respect to ancillary charges. Shippers contend that the railways are imposing ancillary charges for services previously covered by the freight rate without any corresponding reduction in the freight rate. Many shippers complained that ancillary charges have become a significant source of revenue for the railways and are creating additional and unfair transportation costs for shippers.

The Panel notes that the CTA amendments passed in 2008 include a new section, 120.1, that allows shippers to complain to the Agency about the reasonableness of ancillary charges and/or associated terms and conditions.

### *Competitive access rates (extended interswitching)*

Some stakeholders proposed a new provision to increase railway competition. The competitive access rate proposal contemplates an extension to interswitching zones to ensure that a shipper captive to a single federal railway has access to another railway at an interchange of the shipper's choice.

The cost-based rate would be set by the Agency and be available to the shipper, who would then know in advance the regulated rate to move the traffic to a second rail carrier. The rate would include the variable costs incurred by the originating railway, plus a contribution to its fixed costs, in an amount to be determined by the Agency, while recognizing that it is a pro-competitive remedy.

## Infrastructure

### *Branch lines*

A number of stakeholders raised issues related to branch lines, which they believe are an integral part of provincial transportation networks and critical to local/regional economic development particularly in Saskatchewan/Manitoba and the Peace River district of British Columbia/Alberta. Key issues raised include:

- inadequate track maintenance;
- need to upgrade track to main-line standards so that cars can be fully loaded;
- line abandonment;
- demarketing of some lines without putting them up for sale or transfer under the CTA provisions; and
- unreasonable financial and other sale/transfer conditions set by the main-line carriers that discourage the sale of lines to shortline operators.

Key solutions to address branch line concerns include:

- placing a moratorium on line abandonments;
- amending the CTA line transfer provisions to allow more time for entities to consider the railways' discontinuance plans;
- encouraging public/private ownership of low-volume rail lines with running rights given to all railway companies. Such actions would result in long-term planning of railway infrastructure acquisition of rights-of-way, upgrading and investment, all in the public interest;
- empowering the Agency to investigate demarketing and other strategic de-facto abandonment activities of rail carriers;
- transferring low-volume lines to shortline operators; and
- providing federal funding to assist in the establishment of shortline railways.

### *Other infrastructure*

Stakeholders provided the Panel with a list of specific infrastructure issues that have financial, operational and/or policy implications.

Stakeholders identified the following infrastructure projects that require immediate investment:

- New Westminster Bridge;
- General upgrade and increase weight capacity of northern rail lines;
- Lines removed/abandoned/requiring improvement (for example in northern Alberta and northern British Columbia);
  - Hythe to Dawson Creek;
  - Minaret to Dease Lake;
- Watino Bridge; and
- A number of interchange locations.

Stakeholders provided the following as infrastructure projects requiring operational improvements and investment:

- Second Narrows Bridge – open to both CN and CP through legislative amendment to the CTA, in order to ensure CP access to the North Shore in the event of a labour disruption;
- Double stacking out of the Port of Montreal;
- Peace River container depot/intermodal hub;
- Prince George intermodal hub; and
- Resumption of service on the Tisdale-Hudson Bay Line (Churchill issue).

Some stakeholders raised two infrastructure-related issues having significant government policy implications, which would require further review:

- establishing rolling 25-year plans for railway infrastructure and
- mandating infrastructure spending by the railways.

## Labour-Related

### *24/7 operations*

The railways argue that the Panel should recommend that 24/7 operations be the standard business practice for all participants in the supply chain in order to improve coordination and fluidity and to increase capacity. That being said, some non-railway stakeholders argue they still experience serious first mile/last mile service issues and incur financial losses even though they operate 24/7 at the request of the railway. Although there are exceptions, the Panel found that non-railway stakeholders are prepared to work weekends and extra shifts if justified by operational considerations and the volume of business.

### *Loading in inclement weather*

In its submission, CP recommended that Transport Canada and the ports work with stakeholders to implement the recommendations of studies on the inability of terminals to load vessels in inclement weather.

### *Essential services*

In its submission, the Propane Gas Association of Canada argues that rail delivery of propane gas should be declared an essential service since rail is the only effective means of transportation and propane is essential to users for such purposes as heating homes and businesses.

### *Port and rail labour*

Stakeholders noted that port and rail labour issues are very disruptive to the flow of goods in the logistic chain. Furthermore, it often takes several weeks for operations to recover when labour disruptions occur. Stakeholders also indicated that Canada's international reputation as a reliable supplier suffers as a result of these disruptions.

The solutions provided to the Panel by stakeholders suggested that port and rail operations should be deemed essential services as labour reliability, stability and consistency are cornerstones of system performance. These stakeholders suggested the Panel recommend a mandated dispute resolution process applicable to labour negotiations between Class I railways and its employees.

## Other

### *CN WorldWide*

Several non-railway stakeholders provided the Panel with examples of what they believe are conflicts of interest related to the operations of CN WorldWide and CN's relationship with intermodal stakeholders. The Panel believes these are Competition Bureau issues, not rail service issues.

### *Comprehensive review of the CTA*

The Panel heard from many shippers who argue that a statutory review of the CTA should be conducted every five years instead of every eight.

### *Port of Churchill*

It has been suggested that the Government of Canada and the Agency should undertake a comprehensive review of the services provided to the Churchill Gateway System.

Some stakeholders claim the Churchill Gateway System is underutilized because:

1. stakeholders in the catchment area lack efficient access since there is no local shortline service and
2. there are issues related to car supply, line abandonment, refusal by the Class I railways to provide local interchange service and discriminatory/high freight rates.

Stakeholders feel that legislation should be amended to:

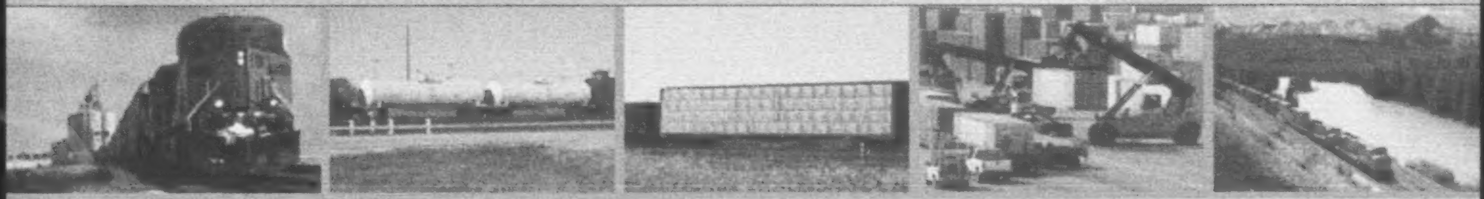
1. prohibit railways from refusing to move traffic over the most direct route;
2. prohibit railways from not operating a rail line without placing the line in the abandonment process; and
3. prevent the railways from implementing anti-competitive pricing against the Port of Churchill.

### *Canadian Wheat Board (CWB) role in transportation*

In both rounds of stakeholder submissions, the Panel received recommendations that the CWB's role in the transportation of grain from farm to terminal elevator should be eliminated as originally suggested in the Estey Report as a means of resolving many of the current problems in grain transportation.

- *Several stakeholders disagree with the Panel's conclusions that issues discussed in Section 7.2 are outside its mandate, in particular the issues of the revenue cap, rail labour, the Port of Churchill, and the role of the CWB in transportation. The Panel considered the points that were raised and remains of the view that these issues are outside its mandate. The Panel still feels these issues are best addressed in other forums.*

# APPENDIX A



## APPENDIX A – RAIL FREIGHT SERVICE REVIEW PANEL MEMBERS' BIOGRAPHIES

### WALTER PASZKOWSKI, Chair

***Walter Paszkowski*** has had long and distinguished political and agri-business careers and has provided a significant contribution to his community, county and the province of Alberta.

Mr. Paszkowski's political career began as a school trustee, progressing to municipal councillor, to Mayor of Sexsmith and finally to member of the Alberta Legislature in 1989. Mr. Paszkowski served in the Alberta legislature until his retirement from provincial politics in March 2001.

During his political career, Mr. Paszkowski served as Minister of Agriculture and Rural Development and Minister responsible for the Land Compensation Board (1993-1997), Minister of Transportation and Utilities and Minister responsible for Public Safety Services (1997-1999) and Minister of Municipal Affairs (1999-2001). During this time, Mr. Paszkowski led or was involved in a number of international missions to promote trade with Canada.

Mr. Paszkowski has been involved in a vast number of agri-business and community interests. Of particular note was his contribution to the development and growth of the canola industry by serving as a Director and a Chair of the Canola Council of Canada, Director and President of the Alberta Canola Growers, and founding Director of the Northern Alberta Rapeseed Crushing Plant and Northern Lite Canola Ltd.

Mr. Paszkowski established an Economic Development Office for the County of Grande Prairie and serves as the County's Economic Development Officer.

Mr. Paszkowski is a Director of the Prince Rupert Port Authority where he chairs the Audit Committee and serves on the Human Resources Committee.

Among his numerous awards and recognitions, Mr. Paszkowski received a lifetime member and achievement award from the Canola Council of Canada, was awarded Canada's 125th Anniversary Medal as well as the Alberta Centennial Medal, and was recognized as one of the "50 Most Influential Albertans in 2006."

Mr. Paszkowski, in partnership with his son, is owner and operator of a family seed farm and retail seed outlet in Sexsmith, Alberta.

## DAVID EDISON

***David Edison*** has had 40 years of experience in rail operations and senior management with Canadian National Railway. During his career, Mr. Edison held progressively senior positions with the company in Newfoundland and Labrador, Nova Scotia, New Brunswick, Quebec, Manitoba and Alberta. Mr. Edison served as Vice President, Pacific Division, headquartered in Vancouver, overseeing Canadian National Railway's operations and sales activities in British Columbia and Alberta, including the ports of Vancouver and Prince Rupert.

Mr. Edison was appointed Vice-President, Corporate, in July 2003 and led Canadian National Railway's consolidation and integration of the Canadian National Railway and BC Rail partnership. These responsibilities included train service adjustment, realignment of rail yards in North Vancouver, Squamish and Prince George, reconnection of Canadian National's Hythe-Dawson Creek line and workforce planning.

Prior to his retirement in late 2004, Mr. Edison was active on the boards of the Western Transportation Advisory Council, the Greater Vancouver Gateway Council and the Business Council of British Columbia.

Mr. Edison resides in Surrey, British Columbia.

## WILLIAM H. (BILL) LEGROW

***William H. (Bill) LeGrow*** has significant industry experience in the rail freight industry spanning a 37-year career that included progressively senior positions with both Canadian National Railway and with West Fraser Mills Ltd. Most recently, Mr. LeGrow served as Vice-President of Transportation and Energy with West Fraser Mills Ltd., a position he held from 1999 until his retirement in 2008.

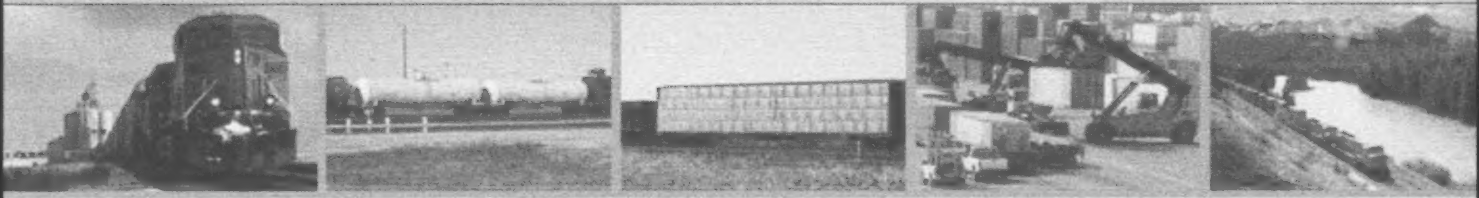
Mr. LeGrow has significant experience in both shipper and railway freight transportation environments. He has been involved in rate negotiations, regulatory reviews as an industry and a shipper association representative and in initiating and leading regulatory challenges as a shipper, under provisions of the *Canada Transportation Act*.

In the mid-80s, through several softwood lumber trade challenges and related disputes, Mr. LeGrow was an active industry participant providing technical advice on implementation, documentation and United States customs procedures, serving on several technical committees and providing policy advice to both the British Columbia and the federal governments.

Mr. LeGrow has extensive experience in regulatory filing procedures and hearings before the British Columbia Utilities Commission representing both West Fraser and as a representative of the Joint Industry Electricity Steering Committee of electrical consumers in British Columbia.

Mr. LeGrow resides in Coquitlam, British Columbia.

# APPENDIX B



## APPENDIX B – TERMS OF REFERENCE FOR A REVIEW OF RAIL FREIGHT SERVICE

### BACKGROUND

The government tabled proposed amendments to the shipper protection provisions of the *Canada Transportation Act* (CTA) on May 30, 2007. At the same time, it announced a commitment to commence a review of railway service within 30 days of the passage of the amendments. Bill C-8 received Royal Assent on February 28, 2008.

The objective of this paper is to describe the scope and approach for conducting a review of the performance of the rail freight transportation supply chain and its impact on rail service to shippers in Canada.

### CONSIDERATIONS

The review will take into consideration that:

- An effective supply chain is critical to meeting the government's objectives related to strategic gateways and trade corridors and to helping shippers compete in domestic, continental and international markets.
- Shippers need an effective, efficient, consistent, and reliable rail transportation supply chain in order to remain competitive and prosper in domestic, continental, and international markets.
- Some shippers, especially bulk commodity shippers, have few, if any, practical alternatives to rail.
- Railways need sufficient revenues to maintain and improve existing rail services and to invest in additional capacity (infrastructure, equipment and crews) in order to respond to the current and future needs of shippers.
- Commercial solutions are preferable to increased regulation, although effective legislation and regulation can foster an environment that will encourage commercial solutions to service problems and disputes.
- While the railways are a key component of the logistics system, other stakeholders (such as shippers and freight forwarders, terminal operators, vessel operators, and ports) also impact the efficiency, effectiveness, consistency and reliability of the supply chain. Many rail movements begin or end at a port or intermodal facility. Therefore, the total movement may involve other stakeholders besides the railways. The interface between elements is an important dimension of the overall effectiveness of the logistics system.
- There are a number of constraints that impact on railway capacity and operations including: availability of land to expand yards and facilities, especially in urban centres; geographical constraints in the busiest rail corridors; and the behaviour and expectations of municipalities and adjacent landowners.
- There is limited infrastructure, which serves a variety of commodities shipped by rail. Therefore, setting priorities can be important.

## ISSUES

The review will address such issues as:

**Shipper size** – The review will address the needs of shippers of all sizes – small, medium, and large – across all sectors, including shippers with particular needs, e.g. dangerous commodities. The review will consider how shipper size impacts supply chain efficiency and capacity.

**Car supply** – Good service means 1) providing reasonably consistent, timely and reliable car supply, in terms of condition, type and numbers, to meet shipper demand; and 2) moving cars efficiently and effectively from origin to destination.

**Demand forecasting** – How do shippers and railways coordinate demand forecasting in both the short term (one year and less) and long term and the corresponding impact on service needs – fleet size, crews, locomotives – as well as infrastructure requirements of both railway and shipper? How are differences in demand forecasts and service/infrastructure needs addressed?

**Peak movements** – Most shippers experience seasonal demand for their products and many experience cyclical demand. It is unreasonable for railways to provide sufficient resources to meet 100 percent of peak demand since it is expensive to "park" resources during off-peak or off-cycle periods. The challenge is to find a balance between the needs of shippers and railways that allows railways to provide effective service to shippers during peak periods while minimizing costs.

**Operating practices** – There may be railway service and operating practices that adversely impact the effectiveness and reliability of service to shippers. The review will identify and assess which practices are effective and which are adversely impacting service to shippers (e.g. co-production and scheduled railway service). The review will also consider the operating practices of others that may have an adverse impact on the logistics chain.

**Shortline railways** – Shortline railways originate approximately 25 percent of rail traffic in Canada. Where shippers served by shortlines are experiencing service problems, the review will examine the relationship between shortlines and the main-line carriers to determine whether such problems are attributable to service, operating, or marketing practices of the main-line carriers.

**Surge capacity/recovery** – Changes or surges in demand for capacity stem from two distinct causes. One driver for surge capacity is market demand that impacts the dynamics and/or timing of trade flows. The review will identify how such surges are taken into consideration during the forecasting process and what is considered an acceptable amount of surge capacity to ensure adequate service is provided and maintained in the event of a market driven surge in demand.

The second cause of a surge in demand for capacity is related to the interruption of the smooth flow of operations; alterations in capacity demand that come about because of system failures which may be attributable to a number of causes, some of which are within the railways' control and others which are not (weather, labour disruptions, marine vessel arrival schedules and poor performance by shippers or terminals). The management of regular capacity must take into account both causes of surges in demand for service so as to allow for adequate service during market-driven surges and a rapid return to normal service when the demand surge related to operational problems is over. The review will identify best practices that facilitate quick recovery as well as the contingency and recovery plans that are deployed by the railways, shippers, and terminal operators; the effectiveness and adequacy of these plans; and additional cost-effective measures and resources (i.e. people, equipment, and facilities) that could be considered.

**Transportation alternatives** – The review will examine the extent to which service issues are a function of practical transportation alternatives, or lack thereof, that are available to shippers.

**Communications** – *Good* service requires effective communications so that shippers and railways are aware of issues that arise with respect to demand and traffic movement and can address them quickly. The review will survey stakeholders (shippers, railways and terminal operators) to identify best practices and flag where improvements may be required.

**Financial impacts** – Unreliable service can have significant financial implications for shippers including costs related to demurrage, performance penalties paid by shippers and railways, lost revenues due to missed sales opportunities/ discounting, avoidable labour costs when cars are not spotted on time, etc. Railways may also experience adverse financial impacts including performance penalties, lost customers, and increased operating costs (e.g. idle labour and equipment). The review will attempt to quantify these impacts, even for a selected sector or group of shippers, to help demonstrate the cost to shippers, terminal operators, and railways of unreliable service or poor performance. This information would be essential to address issues such as reciprocal penalties and the need for investment.

**Data acquisition and confidentiality** – To conduct an objective review, significant amounts of confidential data will need to be collected from shippers, railways, and terminal operators. Transport Canada will need to assure all stakeholders that confidential data will be protected as part of the contracting process and that information released will be aggregated to protect the identity of shippers and carriers. This will be essential to ensure the full cooperation of all parties.

**Dual railway/shipper accountability for poor performance** – The review will assess the degree to which performance penalties and incentives exist today for both shippers and railways and whether they are effective in ensuring reliable and consistent service.

**Other issues** – Any other issues that impact system efficiency and reliability may also be addressed as part of the review.

## OBJECTIVES OF THE REVIEW

The objectives are to:

- Conduct a review of the rail-based logistics chain (including railways, shippers, terminal operators, ports, and vessel operators,), with a focus on service provided to Canadian shippers and customers by Canadian National Railway (CN) and Canadian Pacific Railway (CP) within Canada, including to and from ports and border crossings;
- Identify problems and issues with respect to railway service including those stemming from other elements of the logistics chain;
- For shippers located on shortlines, determine if there are any problems with logistics and, if so, the source of the problem including service, operating, or marketing practices of the main-line carriers;
- Identify best practices and how these can be expanded to address service issues; and
- Make recommendations on how to address these problems and issues, including both commercial and, if necessary, regulatory solutions.

The review will examine the full logistics cycle from customer/railway demand forecasting; customer demand for service (e.g. car or train orders); railway acceptance and commitment to demand, to the spotting, loading, release and pickup of cars at origin; the movement of loaded cars to destination (including the switching of cars between CN, CP and shortlines); the spotting, emptying, release and pickup of cars at destination; and the return of empty cars for loading at origin. It will examine the interaction between railways and other logistics stakeholders (e.g. shippers and domestic end users, terminal operators, ports, and vessel operators) and the effect of third parties on operations and capacity.

## APPROACH

The review will be conducted in two stages. The first stage will consist of quantitative and analytical work. In the second stage, draft recommendations will be developed by a Panel of three eminent persons based on the results of the analytical phase and any other relevant information that is available. The Panel will consult stakeholders on the draft recommendations and submit a final report to the Minister of Transport, Infrastructure and Communities.

### PHASE 1: ANALYTICAL WORK

The analytical phase will consist of four projects:

1. Data gathering and analysis;
2. Assessment of logistics system operational issues;
3. Survey on railway best practices and issues; and
4. Assessment of how service issues are addressed in other transportation sectors and in regulated industries in Canada and the United States.

Consultants will be engaged to conduct the work under the first three projects. Transport Canada will undertake the work on the fourth one. This work is expected to take *a minimum of six months*, depending on the availability of required data and the extent of cooperation from railways, shippers, and terminal operators in providing such data.

#### 1. Data Gathering and Analysis Project

This project is expected to be the most challenging, expensive, and time-consuming. The data phase is intended to help identify and quantify the magnitude of the problems with rail service and other elements of the logistics chain so that appropriate solutions can be developed. Good data analysis will be essential and will complement anecdotal information.

The intention is to assess historical information over a two to three year period for a broad range of commodities. (See proposed commodity list in Annex 1.) Sampling techniques will be used as appropriate to minimize costs, ensure data reliability, and address biases.

It is assumed that, from a shipper's perspective, good service consists of two main components – i) providing sufficient and consistent supply (track capacity, cars, locomotives, and crews) to meet shipper demand in a reasonable manner; and ii) moving traffic in an efficient, timely, orderly and reliable manner.

With respect to demand, key indicators include: number of cars required by shippers (i.e. car orders), number of cars committed by the railway, and number of cars actually delivered. The review will assess whether car order and allocation systems impact the railways' ability to meet shipper forecast demand in a reasonable manner.

There are a couple of demand-related issues that need to be addressed – "phantom" orders (ordering more cars than required in anticipation that less than 100 percent of the orders will be filled) and the availability of reliable and verifiable demand information.

Movement indicators are more readily available and will answer questions such as:

- Did shippers provide timely, reasonable and accurate forecasts of shipping requirements and did the railways accept and agree to such forecasts?
- Were cars spotted, loaded/unloaded, and picked up on a timely basis at origin and destination?
- Were transit times reasonable and consistent?
- Were dwell times reasonable and consistent?
- Were cars loaded in blocks at origin and delivered in the same blocks at destination?
- Did cars arrive in "bunches" at origin and/or destination, i.e. did several blocks of cars arrive unexpectedly at the same time and create congestion? What were the causes of such bunching?
- Were empty transit times reasonable and consistent?
- Do performance indicators vary by type of train, e.g. unit trains vs. manifest trains?

The analysis will indicate that problems occur from time to time. It would be unfair to assume that the railways are responsible for all problems in transit or that shippers and receivers, terminal operators, ports, or vessel operators are similarly responsible for all problems at the facilities where goods are loaded or unloaded. The analysis will have to include an assessment of the cause of the problems. This may be challenging since determining cause can be very subjective. However, it should be possible to identify disruption factors such as derailments, accidents, weather events, lack of vessels at port, strikes, and system outages that would have severe impacts on system performance.

A final report will indicate where there were service problems (nature, frequency and magnitude), causes (railway performance, weather, other stakeholder performance, etc.) and how they were addressed by the various parties.

The report will also describe the types of financial impacts that are experienced as the result of poor performance, including impacts on shippers, terminal operators, railways and others. Selective examples may be provided for illustrative purposes.

This information should be helpful in developing recommendations as part of the second phase related to the effectiveness of system recovery procedures.

This work will be conducted by consultants with experience in collecting and analyzing complex data from shippers and carriers and a thorough understanding of the supply chain from origin to destination.

## 2. Logistics System Operational Issues

A separate project will examine the operating practices of railways, shippers, vessel operators and terminal operators and assess the extent to which they create service problems. For example, while long block trains are assembled at origin, some trains are broken up on route and, as a result, some cars do not arrive at destination in the same block, as they were loaded. This can potentially create handling and operational problems within a port if all the cars in a block are required at the same time to meet a particular vessel.

The fact that CN and CP operate different lengths and configurations of trains can create problems in ensuring equitable treatment under their co-production agreements. This also creates operational problems at the port. However, co-production appears to have improved some operating efficiencies. How can these problems be addressed? Could this concept be expanded elsewhere? Are there labour implications associated with changing operational practices?

Railway and shipper/receiver resource levels have been changing over time, e.g. number of locomotives, storage capacity at destination, number of cars by category, and number of employees by category. How has this affected railway service?

***Other questions that will be examined include:***

- Are capacity constraints affecting service and operations, i.e. insufficient infrastructure, equipment, or crews?
- Should there be surge capacity to handle peak or unexpected demand and to facilitate recovery when there are system problems? Who decides and on what basis? Who should pay for surge capacity?
- Can port congestion be addressed through expansion of off-dock storage or off-dock marshalling facilities?
- Are railway practices related to traffic priorities reasonable, such as when service or capacity must be rationed?
- Are railway practices related to asset utilization and velocity reasonable?
- What practices, if any, of other parties such as shippers and terminals adversely affect system performance?
- How do railways determine and negotiate operational changes in their service levels? To what extent do railways consider shipper needs in establishing operational changes?
- How do community/proximity issues impact the efficiency and capacity of the logistics chain?
- Others?

This project will be conducted by consultants familiar with railway operations. The consultants will identify potential adverse impacts of operational practices within the logistics chain, in particular railway practices, on service to shippers and consult with shippers, railways, and terminals on the impacts and possible solutions. A report on findings and recommendations will be prepared for Transport Canada.

### 3. Survey of Railway Best Practices and Issues

A representative sample of shippers and terminal operators will be surveyed about their views on railway service and the performance of the logistics chain. This will include views on key service concerns as well as best practices of the railways and others who are part of the logistics chain. The survey will seek views on the nature and extent of accountability that exists for the various stakeholders within the logistics system. The survey will also seek views on the frequency that CTA remedies are contemplated and used and on their effectiveness, as well as commercial dispute resolution mechanisms.

Work will be done by a consultant and a report prepared for Transport Canada. The consultant will be asked to propose the best approach for obtaining this information.

This information will be instrumental for Phase 2 to help narrow down the key system issues that need to be addressed.

### 4. Service Issues in Other Regulated Industries

A review will be conducted on how complaints about service are addressed in other modes of transport, in regulated network industries such as telephone, television, gas, hydro-electricity, etc., and in the United States (rail). The study will look into the process/structure for handling complaints and the remedies that are available to determine if there is anything that may be applicable to railway service in Canada.

This study will be done by Transport Canada officials unless workload pressures require that a consultant be engaged.

## PHASE 2: RECOMMENDATIONS STAGE

This stage will commence about one month before the data project report is submitted and will be led by a panel of three eminent persons, preferably consisting of one member with a railway background, one with a shipper background, and one member that is "neutral". This phase will last about 6 months.

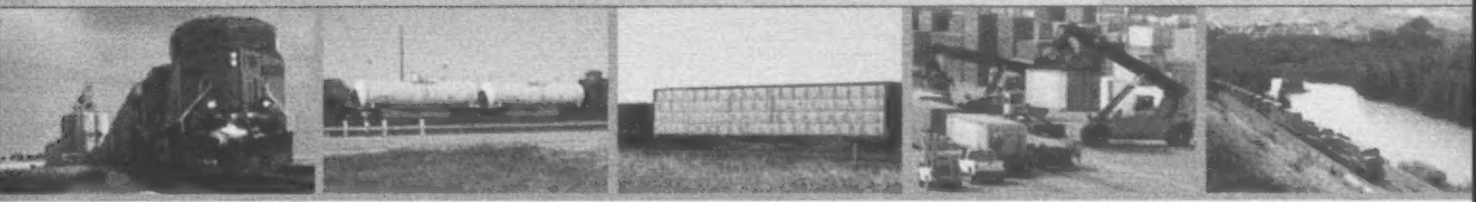
Draft recommendations will be developed based on the results of the analytical projects. In addition, interested parties will be invited to submit comments on railway service and other logistics chain issues, which the panel will also take into consideration.

The draft recommendations and reports from the analytical stage will be circulated to interested parties. The Panel will consult with stakeholders after these documents are circulated. A final report will be submitted to the Minister after the consultations were completed.

## ANNEX 1 – COMMODITY GROUP

- Agriculture
- Coal
- Fertilizers including potash and sulphur
- Forest products including solid wood and pulp and paper
- Fuel and chemicals
- Grain
- Intermodal including retail
- Machinery and automotive
- Manufactured and miscellaneous
- Metals
- Minerals

# APPENDIX C



## APPENDIX C – RAIL FREIGHT SERVICE REVIEW PANEL TERMS OF REFERENCE

### BACKGROUND

When the government tabled proposed amendments to the shipper protection provisions of the *Canada Transportation Act* (CTA) on May 30, 2007, it announced its commitment to begin a review of railway service (within 30 days of the Bill receiving Royal Assent) given significant concerns of railway shippers and other rail-based logistics stakeholders. Bill C-8 received Royal Assent on February 28, 2008. Following consultations with stakeholders, terms of reference for the Review of Rail Freight Service were released on August 12, 2008.

The objectives of the Review are:

- To conduct a review of the rail-based logistics chain (including shippers, terminal operators, ports, and vessels), with a focus on service provided to Canadian shippers and customers by Canadian National Railway (CN) and Canadian Pacific Railway (CP) within Canada, including to and from ports and border crossings;
- To identify problems and issues with respect to railway service including those stemming from other elements of the logistics chain;
- To examine the relationship between shortlines and main-line railways to determine whether any rail service problems being experienced by shortline shippers are attributable to service, operating, or marketing practices of the main-line carriers;
- To identify best practices and how these can be expanded to address service issues; and,
- To make recommendations on how to address these problems and issues, including both commercial and, if necessary, regulatory solutions.

The Review is being conducted in two phases.

- Phase I consists of quantitative and qualitative analytical work being carried out by independent consultants for Transport Canada.
- Phase II consists of the development of recommendations for the Minister by a Panel of three eminent persons based on the results of the analytical phase, any other relevant information, and consultations with stakeholders.

### PANEL'S OBJECTIVE

The Panel will propose recommendations to address problems and issues with respect to service within the rail-based logistics system. The recommendations may include both commercial and, if necessary, regulatory solutions. The recommendations will be aimed at improving the efficiency, effectiveness, and reliability of service within the system, facilitating economic growth and trade expansion, and improving accountability among stakeholders.

In undertaking its work, the Panel will be guided by the general Terms of Reference for the review.

## APPROACH

In conducting its work, the Panel will:

- meet with the Phase I consultants to review and discuss their findings;
- undertake site visits of the rail transportation logistics operations in both western and eastern Canada;
- solicit comments from interested parties on issues, solutions, best practices and factors the Panel should consider in developing its recommendations;
- conduct bilateral meetings with stakeholders, as required;
- develop draft recommendations based on the Phase I consultant reports, stakeholder input and other relevant information;
- release an interim report by May 31, 2010 containing the draft recommendations and solicit comments from interested parties;
- conduct bilateral meetings with stakeholders, as required;
- finalize a set of recommendations after considering comments submitted by interested parties and other relevant information; and
- submit its final report and recommendations to the Minister by August 31, 2010.

## DRAFT REPORT

The Panel's draft report will cover the topics referenced in the *Panel's Objective* which are to be included in its final report. The draft report will be based on the results of the work completed under Phase I, stakeholder submissions and consultations, and any other information the Panel considers relevant.

In seeking comments on its draft report, the Panel will request stakeholders to:

- provide comments on the general acceptability of the draft recommendations;
- where recommendations are not acceptable, provide specific comments on how to improve the draft recommendations;
- provide a sense of prioritization of recommendations;
- comment on the impact of the Panel's recommendations on stakeholders and on service within the system; and
- provide other possible solutions to identified service-related problems that may not have been reflected in the draft recommendations.

## FINAL REPORT AND RECOMMENDATIONS

The final report will:

- describe key problems and issues with the rail-based logistics system;
- summarize stakeholder positions on the key problems and issues;
- summarize solutions put forward to address the key problems and issues, including stakeholder positions on the solutions;
- identify key factors considered by the Panel in developing its recommendations; and
- set out recommendations to address the Panel's assessment of the key problems and issues within the system.

Transport Canada Transports Canada

**Rail Freight Service Review**

**Examen des services de transport ferroviaire des marchandises**

180, rue Elgin Street
Suite/Bureau 808
Ottawa ON, K1A 0N5
(613) 990-9024 (Tel/Tél)
(613) 990-9026 (Fax)
RFSR-EFMS@tc.gc.ca (email/courriel)

November 9, 2009

Dear Stakeholder,

**Call Letter for Submissions**

The Honourable Rob Merrifield, Minister of State (Transport), announced on September 23, 2009, the appointment of a three-person Panel to conduct Phase II of the Rail Freight Service Review. The Panel is pleased to undertake this important review of Canada's rail-based freight logistics chain that will examine the performance of the rail freight transportation supply chain and its impact on rail service to shippers in Canada.

The objectives of the Rail Freight Service Review are to:

- conduct a review of the rail-based logistics chain (including railways, shippers, terminal operators, ports, and vessel operators), with a focus on service provided to Canadian shippers and customers by Canadian National and Canadian Pacific Railway within Canada, including to and from ports and border crossings;
- identify problems and issues with respect to railway service including those stemming from other elements of the logistics chain;
- determine if there are any problems with logistics for shippers located on shortlines and, if so, the source of the problem including service, operating, or marketing practices of the main line carriers;
- identify best practices and how these can be expanded to address service issues; and
- make recommendations on how to address these problems and issues, including both commercial and, if necessary, regulatory solutions.

The Review is being conducted in two phases. The first phase consists of qualitative and analytical work carried out by independent consultants for Transport Canada. That work is progressing well and once completed will be made available to stakeholders for consideration prior to the deadline for stakeholder submissions to the Panel. The final consultant's report from Phase I is expected to be released by January 29, 2010.

The Panel, representing the second phase of the Review, has been asked to propose recommendations to address problems and issues with respect to transportation service within the rail-based logistics system. The terms of reference require the Panel to:

- meet with the Phase I consultants to review and discuss their findings;
- undertake site visits of rail transportation logistics operations in both western and eastern Canada;
- solicit comments from interested parties on issues, solutions, best practices and factors the Panel should consider in developing its recommendations;
- conduct bilateral meetings with stakeholders, as required, prior to the interim report;
- develop draft recommendations based on the Phase I consultant reports, stakeholder input and other relevant information;
- release an interim report containing the draft recommendations and solicit comments from interested parties on the interim report;
- conduct bilateral meetings with stakeholders, as required, following release of the interim report;
- finalize a set of recommendations after considering comments submitted by interested parties and other relevant information; and
- submit its final report and recommendations to the Minister by end of Summer 2010.

The Panel is inviting all interested parties to provide written submissions by February 26, 2010. Unless an express request that a submission not be published is made to the Panel at the time a submission is provided, all submissions received by the Panel and all information contained therein, other than private information or information identified by the originator as commercially sensitive, will be published, as they are received, on the Rail Freight Service Review website at: http://www.tc.gc.ca/policy/acg/rfs-review-examen-sfm. If you concur, it would be appreciated when you forward your submission that you indicate you have no objection to posting the full submission. This will facilitate the expeditious posting of submissions.

Information on how to make a submission is available on the Review website at http://www.tc.gc.ca/policy/acg/rfs-review-examen-sfm/hw-eng.htm. The terms of reference for the Review and Panel, the September 23, 2009 press release announcing the Panel and brief biographies of the Panel members can also be found on the website.

Interested parties are invited to forward their submissions electronically via the Review website or the following email address: rfsr-esmf@tc.gc.ca Submissions may also be provided by fax to (613) 990-9026 or, by mail to the following address:

Rail Freight Service Review
Suite 808
180 Elgin Street
Ottawa, Ontario
K2P 2K3

The Panel is especially interested in receiving submissions for improving the rail-based logistics system that:

- articulate the nature and extent of service issues;
- describe the nature and extent of adverse impacts;
- propose concrete and realistic solutions that can be implemented in a practical manner;
- explain how the recommended solutions address the identified issues or problems;
- highlight best practices that might be adopted to improve service; and
- identify key principles or factors the Panel should consider in developing its recommendations to improve service in the rail-based logistics system in Canada.

The Panel is mindful of the strict timelines for the Review process that are dictated by the need to issue a final report by the end of Summer 2010. The Panel is seeking your cooperation in providing your submission by the February 26, 2010 deadline and working with the Panel, as required, on a timely basis through the balance of the Review process.

We look forward to your submission on improving the rail-based logistics system and encourage you to check the Panel's website from time to time for status reports and updates on the Panel's work, including the posting of the Phase I consultant reports.

Walter Paszkowski

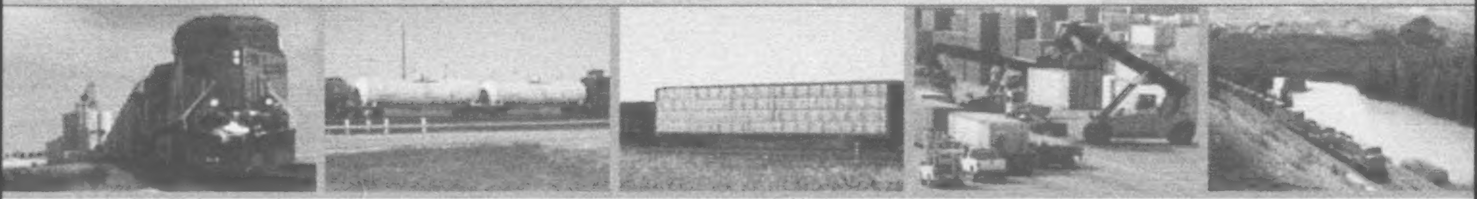
Walter Paszkowski, Chair

D Edison

David Edison, Member

Bill LeGrow, Member

# APPENDIX E



## APPENDIX E – LIST OF STAKEHOLDERS WHO PROVIDED SUBMISSIONS

Stakeholders highlighted in **bold** provided both an initial submission and a submission commenting on the Interim Report.

Stakeholders identified by an * only provided comments on the Interim Report.

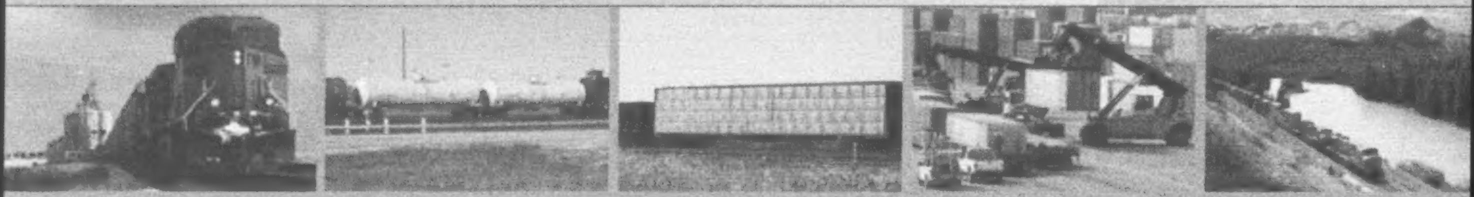
There were 38 other stakeholders who did not give consent for release of their submissions.

1. **Agriculture Producers Association of Saskatchewan**
2. Ainsworth Lumber Co. Ltd.
3. Alberta Association of Municipal Districts and Counties
4. **Alberta, Government of**
    - Alberta Agriculture and Rural Development*
    - **Alberta Transportation**
    - Alberta Grains Council*
5. Alliance Pulse Processors Inc.
6. Alterna Biocarbon
7. **Archibald et al**
8. Armour Transportation Systems
9. **Atlantic Container Line**
10. Atlantic Gateway Advisory Council
11. Battle River Railway
12. **British Columbia, Government of**
13. British Columbia Wharf Operators' Association
14. **Canadian Canola Growers Association**
15. **Canadian Federation of Agriculture**
16. **Canadian Fertilizer Institute**
17. **Canadian Industrial Transportation Association**
18. **Canadian International Freight Forwarders Association**
19. **Canadian National Railway**
20. **Canadian Pacific Railway**
21. Canadian Trucking Alliance
22. **Canadian Wheat Board**
23. Cenovus Energy Inc.
24. **Chamber of Shipping of British Columbia**
25. **Chemistry Industry Association of Canada**
26. Chetwynd, District of
27. Clear Hills County
28. **Coalition of Rail Shippers**
29. Développement Chibougamau (CETC Inc.)
30. Enright, Matt
31. Euro Asia Transload Inc.
32. Farm West Holdings Inc.
33. Forage Exporters in Alberta and Saskatchewan
34. **Forest Products Association of Canada**
35. Fort St. John, City of
36. Fraser Surrey Docks LP
37. GeoMetrix Empowered Logistics

38. **Goff, Cameron**
39. **Grain Growers of Canada**
40. Grande Prairie & District Chamber of Commerce
41. Grande Prairie No.1, County of
42. Graw, David
43. Great Western Grain Co. Ltd.
44. Halifax Chamber of Commerce
45. Halifax Port Authority
46. Halifax Shipping Association
47. High Level, Town of
48. Hutton Forest Products
49. **Inland Terminal Association of Canada**
50. International Automobile Manufactures of Canada, Association of
51. JM Longyear LLC
52. **Keystone Agricultural Producers**
53. Larson, Ken
54. Lemay Farms Inc.
55. Lesser Slave Lake Economic Alliance
56. London Agricultural Commodities
57. Mackenzie County
58. Maersk Canada Inc.
59. Maher Terminals LLC
60. Manitoba Municipalities, Association of
61. Manitoba, Government of
62. Mazda Canada Inc.
63. Montreal Port Authority
64. National Farmers Union
65. Navcor Transportation Services
66. New Brunswick Gateway Council
67. **New Brunswick, Government of**
68. Northeast Terminal Ltd.*
69. **Northern Alberta Development Council**
70. Northern Lights, County of*
71. **Northern Sunrise County**
72. Northgate Terminals
73. Northwest Corridor Development Corporation
74. Northwest Territories, Government of
75. NOVA Chemicals
76. Nova Scotia, Government of
77. **Omineca Beetle Action Coalition**
78. Peace No. 135 and the Town of Grimshaw, Municipal District of
79. **Peace Region Economic Development Alliance**
80. Peace River Regional District
81. Peace River, Town of
82. Petrogas Marketing Ltd.
83. **Port Metro Vancouver**
84. Potash Corporation
85. **Prince Rupert Port Authority**
86. Procor
87. **Propane Gas Association of Canada**
88. Provident Energy Ltd.
89. Quebec Port Authority
90. R.K. Agri Ltd.
91. **Railway Association of Canada**
92. **Saint John Port Authority**
93. **Saskatchewan Association of Rural Municipalities**
94. Saskatchewan Canola Growers Association
95. **Saskatchewan, Government of**
96. Sexsmith Coop Seed Cleaning Plant
97. **Shipping Federation of Canada**

98. South of Fraser Community Rail Task Force
99. Spirit River No. 133, Municipal District of
100. Teck Coal Limited
101. The International Group, Inc.
102. Transport Action Canada*
103. Transport Action Ontario*
104. TSI Terminal Systems Inc.
105. Twin Rivers Plaster Rock
106. Vincett, Howard
107. **Western Canadian Shippers' Coalition**
108. **Western Canadian Wheat Growers Association**
109. **Western Grain Elevators Association**
110. Winslow Group

# APPENDIX F



## APPENDIX F – LIST OF STAKEHOLDERS CONSULTED

1. Ainsworth Lumber Co. Ltd.
2. Alberta Newsprint Company
3. Association of International Automobile Manufacturers of Canada
4. Canadian Canola Growers Association
5. Canadian Fertilizer Institute
6. Canadian Industrial Transportation Association
7. Canadian National Railway
8. Canadian Pacific Railway
9. Canadian Special Crops Association
10. Canadian Wheat Board
11. Canexus
12. Canfor
13. CanPulse Foods
14. Cargill
15. Casco
16. Centerm Container Terminal
17. Centre for Research & Innovation
18. Cerescorp Company
19. Chamber of Shipping of British Columbia
20. Chemistry Industry Association of Canada
21. China Shipping (Canada) Agency Co Ltd.
22. CMA-CGM
23. Coalition of Rail Shippers
24. COSCO Canada Inc.
25. Dow Chemical
26. Evergreen Shipping Agency
27. Forest Products Association of Canada
28. Grain Growers of Canada
29. Grande Cache Coal Corporation
30. Grande Prairie & District Chamber of Commerce
31. Great Western Railway
32. Grieg Star Shipping
33. Halifax Port Authority
34. Hanjin Shipping
35. Hapag-Lloyd
36. Inland Terminal Association of Canada
37. "K" Line Canada Ltd.
38. Kinetic Resources
39. Lantic Sugar Inc.
40. Maersk Canada Inc.
41. Maher Terminals (Prince Rupert)
42. Mining Association of Canada
43. Mitsui O.S.K. Lines Ltd. (MOL)
44. NGL Supply Co Ltd.
45. Norfalco
46. Northgate Terminal
47. Nova Chemicals
48. NYK Logistics
49. OOCL

50. Pacific BioEnergy
51. Parrish and Heimbecker
52. Paterson Global Foods
53. Port Metro Vancouver
54. Port of Montreal
55. Premium Pellet Ltd.
56. Prince Rupert Grain Terminals
57. Prince Rupert Port Authority
58. Propane Gas Association of Canada
59. Pulse Canada
60. Richardson International Ltd.
61. Rio Tinto
62. Shipping Federation of Canada
63. Spectra Energy
64. Teck
65. Tembec
66. TSI Terminal Systems Inc
67. Viterra
68. Viterra (Cascadia Terminal)
69. Walker Seeds
70. West Fraser Timber
71. Western Canadian Shippers Coalition
72. Western Grain Elevator Association
73. Westshore Terminals
74. Westward Shipping Ltd.
75. Westwood Shipping Lines
76. Weyburn Inland Terminal
77. Xstrata
78. Zim

**Note:** *The Panel consulted with 85 stakeholders. Appendix F excludes seven stakeholders whose names were withheld for confidentiality reasons.*

# APPENDIX G

Transport Canada Transports Canada

**Rail Freight Service Review** **L'examen des services de transport ferroviaire des marchandises**

**180, rue Elgin Street**
**Suite/Bureau 808**
**Ottawa ON K1A 0N5**
**(613) 990-9024 (Tel/Tél)**
**(613) 990-9026 (Fax)**
**RFSR-ESMF@tc.gc.ca (email/courriel)**

## October 8, 2010 Call Letter for Submissions on the Interim Report

Dear Sir/Madam:

Please be advised that the Rail Freight Service Review Panel has released its Interim Report. The Report can be found on the Panel's website at http://www.tc.gc.ca/policy/acg/rfs-review-examen-sfm.

The Panel has been asked by the Minister of State (Transport) to propose recommendations to address problems and issues with respect to service within the rail-based logistics system. The Panel was advised that the recommendations may include both commercial and, if necessary, regulatory solutions and that they should be aimed at improving the efficiency, effectiveness, and reliability of service within the system, facilitating economic growth and trade expansion, and improving accountability among stakeholders.

The Panel's draft recommendations are based on a commercial approach with a legislative fallback. The draft recommendations are aimed at rebalancing the relationship between the railways and other stakeholders, in particular shippers.

The recommendations encourage: 1) improved notification of changes in railway service; 2) the use of service agreements between railways and other key stakeholders to clarify roles and responsibilities; 3) implementation of an effective (low cost and timely) dispute resolution process; and 4) enhanced performance reporting with a focus on railways.

The Panel acknowledges the railways' recent efforts to address service issues and recommends the railways be encouraged to continue with a commercial approach, in cooperation with other stakeholders.

The Panel recommends that a focussed assessment be conducted in 2013 to determine if rail service is adequate. If rail service is not adequate, the draft recommendations call for the implementation of specific legislative amendments, contained in the Interim Report, to achieve the rebalancing that is required.

The Minister has asked the Panel to submit its Final Report to him by December 22, 2010. In order to meet this deadline, the Panel is inviting all interested parties to provide written comments on the Interim Report by November 8, 2010.

In particular the Panel is seeking comments on:

- the acceptability and, in particular, the feasibility of the draft recommendations;
- specific improvements to the draft recommendations;
- the relative priority of the draft recommendations;
- the impact of the draft recommendations on stakeholders and on service within the system; and
- other possible solutions to service-related problems that may not have been reflected in the draft recommendations.

Interested parties are invited to forward their comments via the Review website at http://www.tc.gc.ca/eng/policy/acg-rfs-review-examen-sfm-rvw-eng-2546.htm or the following email address: rfsr-esmf@tc.gc.ca. Comments may also be provided by fax to (613) 990-9026 or by mail to the following address:

Rail Freight Service Review
Suite 808
180 Elgin Street
Ottawa, Ontario
K1A 0N5

It is the Panel's intention, in the spirit of openness, to publish on our website all of the comments that are received other than private information or information identified by the originator as commercially sensitive. If you do not wish to have your comments published, please indicate your request when providing written responses or when submitting your comments electronically.

We look forward to receiving your comments by November 8, 2010.

Sincerely,

Walter Paszkowski

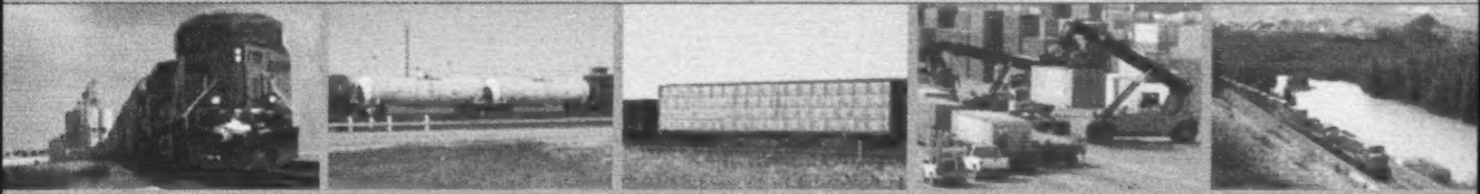
Walter Paszkowski, Chair

D. Edison

David Edison, Member

Bill LeGrow, Member

# APPENDIX H



## APPENDIX H – INTERIM REPORT RECOMMENDATIONS COMMERCIAL APPROACH

In its Interim Report, the Rail Freight Service Review Panel's recommendations contained four key elements that should be implemented commercially to complement current railway initiatives. The Panel's recommendations were to be implemented by the railways in collaboration with supply chain stakeholders.

### *Recommendation 1 (General)*

The Panel recommends that railways, in collaboration with their stakeholders, continue to develop commercial measures to improve rail service. These commercial initiatives would include the four key elements related to service changes, service agreements, dispute resolution and enhanced reporting.

### Recommendations on the four key elements:

### *Recommendation 2*

Prior to implementing changes in local train service, railways should consult affected stakeholders and provide a minimum notification period of 10 working days. Railways should commit to resolving service change disputes through an appropriate dispute resolution mechanism.

### *Recommendation 3*

Railways should enter into good-faith negotiations to establish service agreements upon request by stakeholders who have an operational or commercial relationship with them.

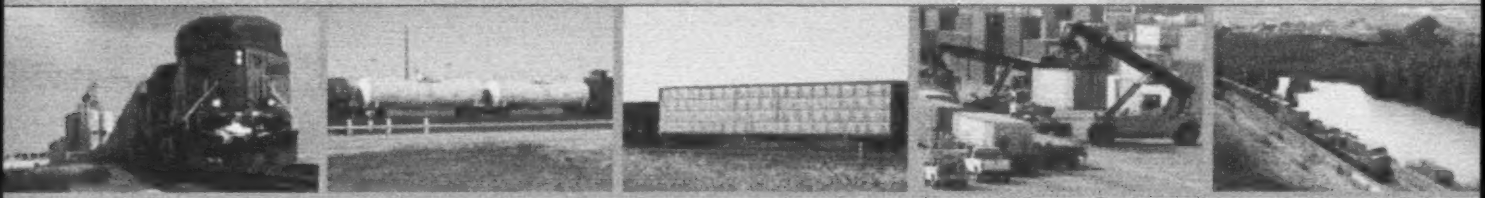
### *Recommendation 4*

The Panel recommends that railways, assisted by a facilitator appointed by Transport Canada, should engage in negotiations with stakeholders, including shortlines, with whom they have a commercial or operational relationship, on a fair and balanced dispute resolution process.

### *Recommendation 5*

Railways should provide improved supply chain visibility through enhanced reporting. The Panel encourages railways to consult with stakeholders to develop acceptable and meaningful reporting at a confidential bilateral level, as well as public reporting at a sector level.

# APPENDIX I



## APPENDIX I – LEVEL OF SERVICES

### Accommodation for traffic

113. (1) A railway company shall, according to its powers, in respect of a railway owned or operated by it,

(*a*) furnish, at the point of origin, at the point of junction of the railway with another railway, and at all points of stopping established for that purpose, adequate and suitable accommodation for the receiving and loading of all traffic offered for carriage on the railway;

(*b*) furnish adequate and suitable accommodation for the carriage, unloading and delivering of the traffic;

(*c*) without delay, and with due care and diligence, receive, carry and deliver the traffic;

(*d*) furnish and use all proper appliances, accommodation and means necessary for receiving, loading, carrying, unloading and delivering the traffic; and

(*e*) furnish any other service incidental to transportation that is customary or usual in connection with the business of a railway company.

### Carriage on payment of rates

(2) Traffic must be taken, carried to and from, and delivered at the points referred to in paragraph 1.a) on the payment of the lawfully payable rate.

### Compensation for provision of rolling stock

(3) Where a shipper provides rolling stock for the carriage by the railway company of the shipper's traffic, the company shall, at the request of the shipper, establish specific reasonable compensation to the shipper in a tariff for the provision of the rolling stock.

### Confidential contract between company and shipper

(4) A shipper and a railway company may, by means of a confidential contract or other written agreement, agree on the manner in which the obligations under this section are to be fulfilled by the company.

### *Facilities for traffic*

114. (1) A railway company shall, according to its powers, afford to all persons and other companies all adequate and suitable accommodation for receiving, carrying and delivering traffic on and from its railway, for the transfer of traffic between its railway and other railways and for the return of rolling stock.

### *Through traffic*

(2) For the purposes of subsection (1), adequate and suitable accommodation includes reasonable facilities for the receiving, carriage and delivery by the company

(*a*) at the request of any other company, of through traffic and, in the case of goods shipped by carload, of the car with the goods shipped in it, to and from the railway of the other company, at a through rate; and

(*b*) at the request of any person interested in through traffic, of such traffic at through rates.

### *Connecting railway to reasonable facilities*

(3) Every railway company that has or operates a railway forming part of a continuous line of railway with or that intersects any other railway, or that has any terminus, station or wharf near to any terminus, station or wharf of another railway, shall afford all reasonable facilities for delivering to that other railway, or for receiving from or carrying by its railway, all the traffic arriving by that other railway without any unreasonable delay, so that

(*a*) no obstruction is offered to the public desirous of using those railways as a continuous line of communication; and

(*b*) all reasonable accommodation, by means of the railways of those companies, is at all times afforded to the public for that purpose.

### *Similar facilities for truckers*

(4) If a railway company provides facilities for the transportation by rail of motor vehicles or trailers operated by any company under its control for the conveyance of goods for hire or reward,

(*a*) the railway company shall offer to all companies operating motor vehicles or trailers for the conveyance of goods for hire or reward similar facilities at the same rates and on the same terms and conditions as those applicable to the motor vehicles or trailers operated by the company under its control; and

(*b*) the Agency may disallow any rate or tariff that is not in compliance with this subsection and direct the company to substitute a rate or tariff that complies with this subsection.

### *Adequate and suitable accommodation*

**115.** For the purposes of subsection 113(1) or 114(1), adequate and suitable accommodation includes reasonable facilities

(*a*) for the junction of private sidings or private spurs with a railway owned or operated by a company referred to in that subsection; and

(*b*) for receiving, carrying and delivering traffic on and from private sidings or private spurs and placing cars and moving them on and from those private sidings or private spurs.

### *Complaint and investigation concerning company's obligations*

**116.** (1) On receipt of a complaint made by any person that a railway company is not fulfilling any of its service obligations, the Agency shall

(*a*) conduct, as expeditiously as possible, an investigation of the complaint that, in its opinion, is warranted; and

(*b*) within one hundred and twenty days after receipt of the complaint, determine whether the company is fulfilling that obligation.

### *Confidential contract binding on Agency*

(2) If a company and a shipper agree, by means of a confidential contract, on the manner in which service obligations under section 113 are to be fulfilled by the company, the terms of that agreement are binding on the Agency in making its determination.

### *Competitive line rate provisions binding on Agency*

(3) If a shipper and a company agree under subsection 136(4) on the manner in which the service obligations are to be fulfilled by the local carrier, the terms of the agreement are binding on the Agency in making its determination.

### *Orders of Agency*

(4) If the Agency determines that a company is not fulfilling any of its service obligations, the Agency may

(*a*) order that

(*i*) specific works be constructed or carried out,

(*ii*) property be acquired,

(*iii*) cars, motive power or other equipment be allotted, distributed, used or moved as specified by the Agency, or

(*iv*) any specified steps, systems or methods be taken or followed by the company;

(*b*) specify in the order the maximum charges that may be made by the company in respect of the matter so ordered;

(*c*) order the company to fulfil that obligation in any manner and within any time or during any period that the Agency deems expedient, having regard to all proper interests, and specify the particulars of the obligation to be fulfilled;

(*d*) if the service obligation is in respect of a grain-dependent branch line listed in Schedule I, order the company to add to the plan it is required to prepare under subsection 141(1) an indication that it intends to take steps to discontinue operating the line; or

(*e*) if the service obligation is in respect of a grain-dependent branch line listed in Schedule I, order the company, on the terms and conditions that the Agency considers appropriate, to grant to another railway company the right

(*i*) to run and operate its trains over and on any portion of the line, and

(*ii*) in so far as necessary to provide service to the line, to run and operate its trains over and on any portion of any other portion of the railway of the company against which the order is made but not to solicit traffic on that railway, to take possession of, use or occupy any land belonging to that company and to use the whole or any portion of that company's right-of-way, tracks, terminals, stations or station grounds.

### *Right of action on default*

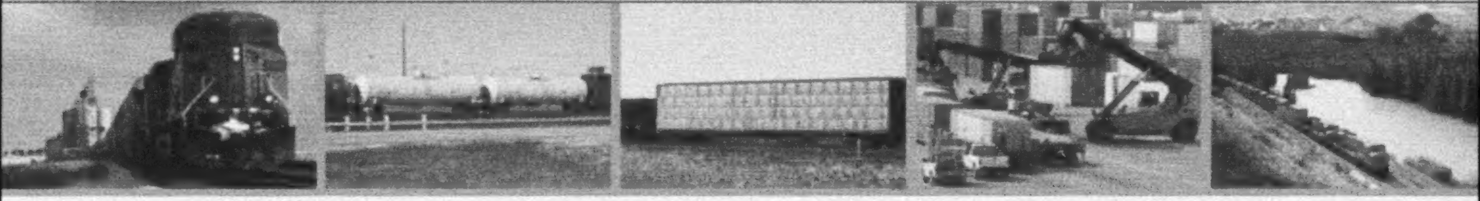
(5) Every person aggrieved by any neglect or refusal of a company to fulfil its service obligations has, subject to this Act, an action for the neglect or refusal against the company.

### *Company not relieved*

(6) Subject to the terms of a confidential contract referred to in subsection 113(4) or a tariff setting out a competitive line rate referred to in subsection 136(4), a company is not relieved from an action taken under subsection (5) by any notice, condition or declaration if the damage claimed in the action arises from any negligence or omission of the company or any of its employees.

1996, c. 10, s. 116; 2000, c. 16, s. 4.

# APPENDIX J



## APPENDIX J – FINAL OFFER ARBITRATION

### *Application of sections 161 to 169*

**159.** (1) Sections 161 to 169 apply only in respect of matters arising between shippers and carriers that involve

(*a*) the carriage of goods by air to which Part II applies, other than their carriage internationally;

(*b*) the carriage of goods by railways to which this Act applies, other than the carriage of goods in trailers or containers on flat cars unless the containers arrive by water at a port in Canada, served by only one railway company, for further movement by rail or arrive by rail at such a port in Canada for further movement by water; or

(*c*) the carriage by water, for hire or reward, of goods required for the maintenance or development of a municipality or any permanent settlement for northern marine resupply purposes, other than goods required in relation to national defence or in relation to the exploration for or the development, extraction or processing of oil, gas or any mineral.

### *Scope of paragraph (1)(c)*

(2) Paragraph (1)(*c*) applies only to resupply services on

(*a*) the rivers, streams, lakes and other waters within the watershed of the Mackenzie River;

(*b*) the territorial sea and internal waters of Canada that are adjacent to the coast of the mainland and islands of the Canadian Arctic and situated within the area bounded by the meridians of longitude 95° West and 141° West and the parallels of latitude 66°00'30" North and 74°00'20" North; and

(*c*) the internal waters of Canada comprised in Spence Bay and Shepherd Bay and situated east of the meridian of longitude 95° West.

### *Application*

(3) Paragraph (1)(*c*) applies only if

(*a*) the total register tonnage of all ships used to provide the resupply service exceeds fifty register tons; or

(*b*) the resupply service originates from a point situated on the waters described in subsection (2).

### *Rail passenger services*

**160.** Sections 161 to 169 also apply, with any modifications that the circumstances require, in respect of the rates charged or proposed to be charged by, and in respect of any of the conditions associated with the provision of services by, a railway company to any other railway company engaged in passenger rail services, except a public passenger service provider as defined in section 87.

1996, c. 10, s. 160; 2008, c. 5, s. 8.

## Final Offer Arbitration

### *Submission for final offer arbitration*

**161.** (1) A shipper who is dissatisfied with the rate or rates charged or proposed to be charged by a carrier for the movement of goods, or with any of the conditions associated with the movement of goods, may, if the matter cannot be resolved between the shipper and the carrier, submit the matter in writing to the Agency for a final offer arbitration to be conducted by one arbitrator or, if the shipper and the carrier agree, by a panel of three arbitrators.

### *Contents of submission*

(2) A copy of a submission under subsection (1) shall be served on the carrier by the shipper and the submission shall contain

*(a)* the final offer of the shipper to the carrier in the matter, excluding any dollar amounts;

*(b)* [Repealed, 2000, c. 16, s. 11]

*(c)* an undertaking by the shipper to ship the goods to which the arbitration relates in accordance with the decision of the arbitrator;

*(d)* an undertaking by the shipper to the Agency whereby the shipper agrees to pay to the arbitrator the fee for which the shipper is liable under section 166 as a party to the arbitration; and

*(e)* the name of the arbitrator, if any, that the shipper and the carrier agreed should conduct the arbitration or, if they agreed that the arbitration should be conducted by a panel of three arbitrators, the name of an arbitrator chosen by the shipper and the name of an arbitrator chosen by the carrier.

### *Arbitration precluded in certain cases*

(3) The Agency shall not have any matter submitted to it by a shipper under subsection (1) arbitrated if the shipper has not, at least five days before making the submission, served on the carrier a written notice indicating that the shipper intends to submit the matter to the Agency for a final offer arbitration.

### *Final offer arbitration not a proceeding*

(4) A final offer arbitration is not a proceeding before the Agency.

1996, c. 10, s. 161; 2000, c. 16, s. 11.

### *Submission of final offers*

**161.** (1) Within 10 days after a submission is served under subsection 161(2), the shipper and the carrier shall submit to the Agency their final offers, including dollar amounts.

### *Copies to the parties*

(2) Without delay after final offers are submitted under subsection (1) by both the shipper and the carrier, the Agency shall provide the shipper and the carrier with copies of each other's final offer.

### *If no final offer from a party*

(3) If one party does not submit a final offer in accordance with subsection (1), the final offer submitted by the other party is deemed to be the final offer selected by the arbitrator under subsection 165(1).

2000, c. 16, s. 12.

### *Arbitration*

**162.** (1) Notwithstanding any application filed with the Agency by a carrier in respect of a matter, within five days after final offers are received under subsection 161.1(1), the Agency shall refer the matter for arbitration

*(a)* if the parties did not agree that the arbitration should be conducted by a panel of three arbitrators, to the arbitrator, if any, named under paragraph 161(2)*(e)* or, if that arbitrator is not, in the opinion of the Agency, available to conduct the arbitration or no arbitrator is named, to an arbitrator on the list of arbitrators referred to in section 169 who the Agency chooses and determines is appropriate and available to conduct the arbitration; and

*(b)* if the parties agreed that the arbitration should be conducted by a panel of three arbitrators,

*(i)* to the arbitrators named by the parties under paragraph 161(2)(e) and to any arbitrator who those arbitrators have, within 10 days after the submission was served under subsection 161(2), notified the Agency that they have agreed on, or if those arbitrators did not so notify the Agency, to an arbitrator on the list of arbitrators referred to in section 169 who the Agency chooses and determines is appropriate and available to conduct the arbitration, or

*(ii)* if an arbitrator referred to in subparagraph *(i)* is not, in the opinion of the Agency, available to conduct the arbitration, to the arbitrators named in that subparagraph who are available and to an arbitrator chosen by the Agency from the list of arbitrators referred to in section 169 who the Agency determines is appropriate and available to conduct the arbitration.

### *Interpretation*

(1.1) If a matter was referred to a panel of arbitrators, every reference in subsections (1.2) and (2) and sections 163 to 169 to an arbitrator or the arbitrator shall be construed as a reference to a panel of arbitrators or the panel of arbitrators, as the case may be.

### *Delay in referral*

(1.2) If the shipper consents to an application referred to in subsection (1) being heard before the matter is referred to an arbitrator, the Agency shall defer referring the matter until the application is dealt with.

### *Assistance by Agency*

(2) The Agency may, at the request of the arbitrator, provide administrative, technical and legal assistance to the arbitrator on a cost recovery basis.

1996, c. 10, s. 162; 2000, c. 16, s. 13.

## Decision or order affecting a matter being arbitrated

**162.1** The Agency may, in addition to any other decision or order it may make, order that an arbitration be discontinued, that it be continued subject to the terms and conditions that the Agency may fix or that the decision of the arbitrator be set aside if

*(a)* the Agency makes a decision or an order arising out of an application that is in respect of a matter submitted to the Agency for a final offer arbitration and that is filed by a carrier before the matter is referred to arbitration; and

*(b)* the decision or order affects the arbitration.

2000, c. 16, s. 14.

### Procedure

163. (1) In the absence of an agreement by the arbitrator and the parties as to the procedure to be followed, a final offer arbitration shall be governed by the rules of procedure made by the Agency.

### Procedure generally

(2) The arbitrator shall conduct the arbitration proceedings as expeditiously as possible and, subject to the procedure referred to in subsection (1), in the manner the arbitrator considers appropriate having regard to the circumstances of the matter.

### Exchange of information

(3) Within fifteen days after the Agency refers a matter for arbitration, the parties shall exchange the information that they intend to submit to the arbitrator in support of their final offers.

### Interrogatories

(4) Within seven days after receipt of the information referred to in subsection (3), each party may direct interrogatories to the other, which shall be answered within fifteen days after their receipt.

### Withholding of information

(5) If a party unreasonably withholds information that the arbitrator subsequently deems to be relevant, that withholding shall be taken into account by the arbitrator in making a decision.

### Arbitration information

164. (1) The arbitrator shall, in conducting a final offer arbitration between a shipper and a carrier, have regard to the information provided to the arbitrator by the parties in support of their final offers and, unless the parties agree to limit the amount of information to be provided, to any additional information that is provided by the parties at the arbitrator's request.

### Arbitration considerations

(2) Unless the parties agree otherwise, in rendering a decision the arbitrator shall have regard to whether there is available to the shipper an alternative, effective, adequate and competitive means of transporting the goods to which the matter relates and to all considerations that appear to the arbitrator to be relevant to the matter.

### Summary process

164.1 If the Agency determines that a shipper's final offer submitted under subsection 161.1(1) involves freight charges in an amount of not more than $750,000 and the shipper did not indicate a contrary intention when submitting the offer, sections 163 and 164 do not apply and the arbitration shall proceed as follows:

(*a*) within seven days after a matter is referred to an arbitrator, the shipper and the carrier may file with the arbitrator a response to the final offer of the other party;

(*b*) subject to paragraph (*c*), the arbitrator shall decide the matter on the basis of the final offers and any response filed under paragraph (*a*); and

(*c*) if the arbitrator considers it necessary, the arbitrator may invite the parties to make oral representations or may ask the parties to appear before him or her to provide further information.

2000, c. 16, s. 15.

### Decision of arbitrator

**165.** (1) The decision of the arbitrator in conducting a final offer arbitration shall be the selection by the arbitrator of the final offer of either the shipper or the carrier.

### Requirements re decision

(2) The decision of the arbitrator shall

(*a*) be in writing;

(*b*) unless the parties agree otherwise, be rendered within 60 days or, in the case of an arbitration conducted in accordance with section 164.1, 30 days after the date on which the submission for the final offer arbitration was received by the Agency; and

(*c*) unless the parties agree otherwise, be rendered so as to apply to the parties for a period of one year or any lesser period that may be appropriate, having regard to the negotiations between the parties that preceded the arbitration.

### Incorporation in tariff

(3) The carrier shall, without delay after the arbitrator's decision, set out the rate or rates or the conditions associated with the movement of goods that have been selected by the arbitrator in a tariff of the carrier, unless, where the carrier is entitled to keep the rate or rates or conditions confidential, the parties to the arbitration agree to include the rate or rates or conditions in a contract that the parties agree to keep confidential.

### Reasons not required

(4) No reasons shall be set out in the decision of the arbitrator.

### Reasons may be requested

(5) The arbitrator shall, if requested by all of the parties to the arbitration within 30 days or, in the case of an arbitration conducted in accordance with section 164.1, seven days after the decision of the arbitrator, give written reasons for the decision.

### Application of decision

(6) Except where both parties agree otherwise,

(*a*) the decision of the arbitrator on a final offer arbitration shall be final and binding and be applicable to the parties as of the date on which the submission for the arbitration was received by the Agency from the shipper, and is enforceable as if it were an order of the Agency; and

(*b*) the arbitrator shall direct in the decision that interest at a reasonable rate specified by the arbitrator shall be paid to one of the parties by the other on moneys that, as a result of the application of paragraph (*a*), are owed by a party for the period between the date referred to in that paragraph and the date of the payment.

### Payment by party

(7) Moneys and interest referred to in paragraph (6)(*b*) that are owed by a party pursuant to a decision of the arbitrator shall be paid without delay to the other party.

1996, c. 10, s. 165; 2000, c. 16, s. 16.

### Arbitration fees

**166.** (1) The Agency may fix the fee to be paid to an arbitrator for the costs of, and the services provided by, the arbitrator in final offer arbitration proceedings.

### Payment of fees and costs

(2) The shipper and the carrier shall share equally, whether or not the proceedings are terminated pursuant to section 168, in the payment of the fee fixed under subsection (1) and in the cost

(*a*) borne by the Agency for administrative, technical and legal services provided to the arbitrator pursuant to subsection 162(2); and

(*b*) of the preparation of any reasons requested pursuant to subsection 165(5).

### *Confidentiality of information*

**167.** Where the Agency is advised that a party to a final offer arbitration wishes to keep matters relating to the arbitration confidential,

*(a)* the Agency and the arbitrator shall take all reasonably necessary measures to ensure that the matters are not disclosed by the Agency or the arbitrator or during the arbitration proceedings to any person other than the parties; and

*(b)* no reasons for the decision given pursuant to subsection 165(5) shall contain those matters or any information included in a contract that the parties agreed to keep confidential.

### *Termination of proceedings*

**168.** Where, before the arbitrator renders a decision on a final offer arbitration, the parties advise the Agency or the arbitrator that they agree that the matter being arbitrated should be withdrawn from arbitration, the arbitration proceedings in respect of the matter shall be immediately terminated.

### *List of arbitrators*

**169.** (1) The Agency shall, from time to time, in consultation with representatives of shippers and carriers, establish a list of persons who agree to act as arbitrators in final offer arbitrations. The list must state which of the persons have indicated that they have expertise that may assist them in conducting final offer arbitrations and the nature of that expertise.

### *List per mode*

(2) A separate list of persons may be established under subsection (1) in respect of each or any mode of transportation, as the Agency considers appropriate.

### *Publication of list*

(3) The Agency shall have the list of persons made known to representatives of shippers and carriers throughout Canada.

1996, c. 10, s. 169; 2000, c. 16, s. 17.

### *Mediation*

**169.1** (1) The parties to a final offer arbitration may, by agreement, refer to a mediator, which may be the Agency, a matter that has been submitted for a final offer arbitration under section 161.

### *Establishment of roster*

(2) The Agency may establish a roster of persons, which may include members and staff of the Agency, to act as mediators in any matter referred to it under subsection (1).

### *Confidentiality of mediation*

(3) All matters relating to the mediation shall be kept confidential, unless the parties otherwise agree, and information provided by a party for the purposes of the mediation shall not be used for any other purpose without the consent of that party.

### *Time limit for completion of mediation*

(4) Unless the parties otherwise agree, the mediation shall be completed within 30 days after the matter is referred for mediation.

### *Effect of mediation on final offer arbitration*

(5) The mediation has the effect of

*(a)* staying the conduct of the final offer arbitration for the period of the mediation; and

*(b)* extending the time within which the arbitrator must make a decision in the matter of the final offer arbitration by the period of the mediation.

### *Mediator not to act in other proceedings*

(6) The person who acts as mediator may not act in any other proceedings in relation to any matter that was at issue in the mediation.

2008, c. 5, s. 7.

### *Joint offer of several shippers*

169.2 (1) In the case where more than one shipper is dissatisfied with the rate or rates charged or proposed to be charged by a carrier for the movement of goods, or with any conditions associated with the movement of goods, those shippers may, if the matter cannot be resolved between them and the carrier, submit the matter jointly to the Agency for a final offer arbitration, in which case sections 161 to 169 apply, with any modifications that the circumstances require.

### *Common matter and application of the offer*

(2) A matter submitted jointly to the Agency for a final offer arbitration shall be common to all the shippers and the shippers shall make a joint offer in respect of the matter, the terms of which apply to all of them.

### *Arbitration precluded in certain cases*

(3) The Agency shall not have any matter submitted to it for a final offer arbitration under subsection (1) arbitrated unless the shippers demonstrate, to the satisfaction of the Agency, that an attempt has been made to mediate the matter.

### *Confidentiality of mediation*

(4) All matters relating to a mediation shall be kept confidential, unless the parties otherwise agree, and information provided by a party for the purposes of the mediation shall not be used for any other purpose without the consent of that party.

### *Mediator not to act in other proceedings*

(5) The person who acts as mediator may not act in any other proceedings in relation to any matter that was at issue in the mediation.

### *Matter submitted by more than one shipper*

(6) In the case of a matter that is submitted jointly under subsection (1),

(*a*) the period referred to in subsection 161.1(1) is 20 days;

(*b*) the arbitrator may, if he or she considers it necessary, extend any of the periods referred to in subsections 163(3) and (4) and paragraph 164.1(*a*); and

(*c*) the decision of the arbitrator shall, despite paragraph 165(2)(*b*), be rendered within 120 days or, in the case of an arbitration conducted in accordance with section 164.1, 90 days after the day on which the submission for the final offer arbitration is received by the Agency unless the parties agree otherwise.

2008, c. 5, s. 7.

### *Time limit — preliminary applications*

**169.3** (1) Despite sections 162 and 162.1, any application filed with the Agency by a carrier in respect of a matter submitted jointly to the Agency under subsection 169.2(1) shall be filed with the Agency no later than seven days after the day on which the joint submission is made.

### *Service of copy*

(2) A copy of the application shall be served on each of the shippers making the joint submission no later than the day on which the application is required to be filed under subsection (1).

### *Joint answer*

(3) The shippers, no later than five days after the day on which the last shipper was served under subsection (2), shall file with the Agency a joint answer to the application and serve a copy of it on the carrier.

### *Reply*

(4) The carrier, no later than two days after the day on which it was served under subsection (3), shall file with the Agency a reply to the joint answer and serve a copy of it on each of the shippers.

### *Decision of Agency*

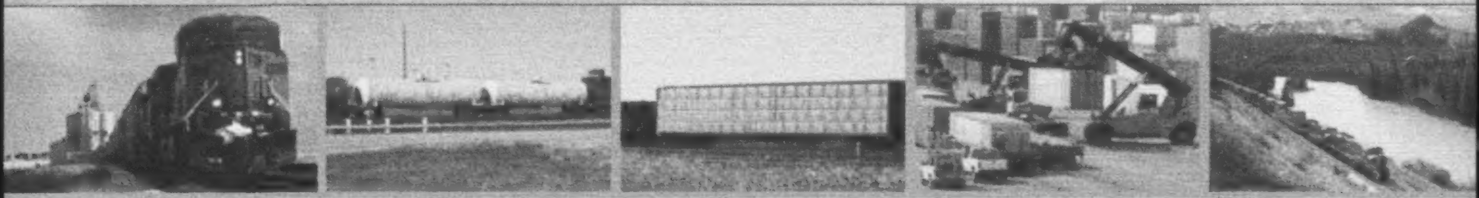
(5) The Agency shall issue its decision on the application no later than the day on which the matter is required to be referred to arbitration under subsection 162(1).

### *Deemed conformity*

(6) If no application referred to in subsection (1) is filed within the limit set out in that subsection, the matter submitted jointly is deemed to conform to the requirements of subsection 169.2(2).

2008, c. 5, s. 7.

# APPENDIX K



## APPENDIX K – ANCILLARY CHARGES

### *Unreasonable Charges or Terms*

**120.1** (1) If, on complaint in writing to the Agency by a shipper who is subject to any charges and associated terms and conditions for the movement of traffic or for the provision of incidental services that are found in a tariff that applies to more than one shipper other than a tariff referred to in subsection 165(3), the Agency finds that the charges or associated terms and conditions are unreasonable, the Agency may, by order, establish new charges or associated terms and conditions.

### *Period of validity*

(2) An order made under subsection (1) remains in effect for the period, not exceeding one year, specified in the order.

### *Factors to be considered*

(3) In deciding whether any charges or associated terms and conditions are unreasonable, the Agency shall take into account the following factors:

(*a*) the objective of the charges or associated terms and conditions;

(*b*) the industry practice in setting the charges or associated terms and conditions;

(*c*) in the case of a complaint relating to the provision of any incidental service, the existence of an effective, adequate and competitive alternative to the provision of that service; and

(*d*) any other factor that the Agency considers relevant.

### *Commercially fair and reasonable*

(4) Any charges or associated terms and conditions established by the Agency shall be commercially fair and reasonable to the shippers who are subject to them as well as to the railway company that issued the tariff containing them.

### *Duty to vary tariff*

(5) The railway company shall, without delay after the Agency establishes any charges or associated terms and conditions, vary its tariff to reflect those charges or associated terms and conditions.

### *No variation*

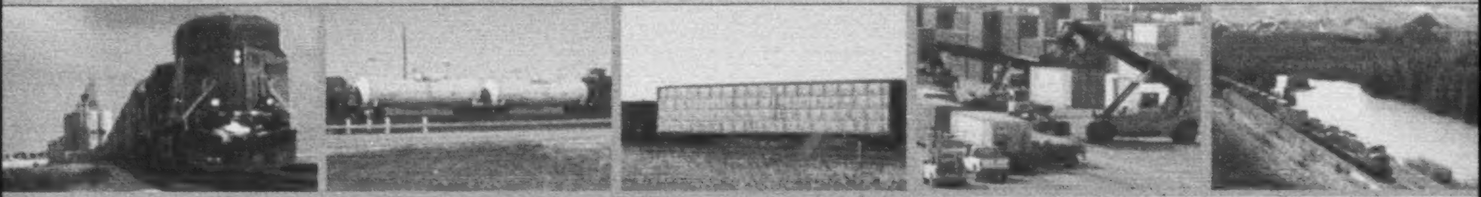
(6) The railway company shall not vary its tariff with respect to any charges or associated terms and conditions established by the Agency until the period referred to in subsection (2) has expired.

### *Clarification*

(7) For greater certainty, this section does not apply to rates for the movement of traffic.

2008, c. 5, s. 3.

# APPENDIX L



## APPENDIX L – PHASE I RESEARCH COMMISSIONED BY TRANSPORT CANADA

### QGI Consulting

1. *Analysis of Railway Fulfillment of Shipper Demand and Transit Times*, March 2010.
2. *Description of Canada's Rail based Freight Logistics System*, November 2009.
3. *Analysis of Operating Practices*, October 2009.

### QGI Technical Reports

*(a)* Sampling Methodology, March 2009.

*(b)* Railway Demand Forecasting and Service Planning, March 2010.

*(c)* Railway Car Order and Car Supply Processes, March 2010.

*(d)* Illustration of Financial Impacts on System Stakeholders, March, 2010.

*(e)* Dual Railway/Shipper Accountability for Poor Performance, March 2010.

### NRG Research Group

1. *Survey of Shippers*, November 30, 2009.
2. *Survey of Other Stakeholders – Terminal Operators, Ports and Shipping Lines*, January 18, 2010.

### CPCS Transcom Limited

Service Issues in Regulated Industries Other than Canadian Rail Freight Industry, August 31, 2009.

**Note:** *Copies of all reports are available on the Rail Freight Service Review website: http://www.tc.gc.ca/eng/policy/acg-rfs-review-examen-sfm-rvw-eng-442.htm.*

# APPENDIX M

CN

www.cn.ca

**Claude Mongeau**
President and
Chief Executive Officer

935 de La Gauchetière Street West
Montreal, Quebec H3B 2M9
Canada
**T** 514-399-2963

Président-
directeur général

935, rue de La Gauchetière ouest
Montréal (Québec) H3B 2M9
Canada
claude.mongeau@cn.ca

December 3, 2010

***(via email: RFSR-ESMF@tc.gc.ca)***

Mr. Walter Paszkowski, Chair
Mr. David Edison, Member
Mr. William H. LeGrow, Member
Rail Freight Service Review
Suite 808 - 180 Elgin Street
Ottawa ON
K1A 0N5

Dear Panel Members:

I want to thank you for taking the time to meet with me and my colleagues in Ottawa on November 30th, and for the follow-up conference call of December 2nd. As for all of our previous meetings, we were able to have a frank and constructive dialogue on the important matters that are at the core of your Panel's review and mandate.

At this critical juncture in your process, you have a unique opportunity to show leadership by signalling your support for the strong momentum of positive change that is taking place in the rail industry and to encourage tighter accountability across the supply chains that serve Canadian shippers. You have all the facts in front of you. You have heard first-hand the views of the railroads and of a range of stakeholders who commented during the process, even if often from opposing ends. You have seen the analytical work from the Phase 1 consultants retained by Transport Canada who shed light on the absence of any market structure issue from a service stand-point and on the fact that there is no evidence of any serious gaps in the regulatory regime applying to Canadian railways.

Over the last 12 to 18 months, you have witnessed our significant progress in reaching Service Level Agreements with all major Canadian ports and with a large number of terminal partners who were willing to work with CN. You saw the seeds of our customer engagement already bearing fruits, such as with our transformational Scheduled Grain Plan innovation. In short, you saw the comprehensive efforts we are making to drive service improvements across our customer base in Canada. And, importantly, I have also told you unequivocally about our commitment to continue on this path of innovation and engagement with our customers and supply-chain partners.

.../2

Despite all this positive change, I am concerned that the Panel, instead of taking credit as a catalyst for this momentum, is drifting backward in the direction of a regulatory approach. As late as August, I was encouraged by the commercial mindset that seemed to be framing the Panel's thinking, and we agreed with your proposal for a clear check point on our service in 2013 coupled with a regulatory fall-back if the railways do not live up to their promise of sustained improvement. Then, with absolutely no new facts on the record, and for reasons I fail to comprehend, your thinking shifted towards immediate drafting of fall-back legislation. And now, as you finalize your report, you are asking us to rewrite our commitment letter and to agree, under the guise of a commercial approach, to a range of regulatory-like processes which are impractical and run counter to the innovation and service initiatives we are driving at CN.

In my respectful view, this approach is not conducive to sound public policy. It would be far preferable for the Panel to set a broad framework and to recommend a clear course of action from a policy standpoint. That framework is either commercial or it is regulatory. The course of action is either to let the parties come together to find practical solutions that address their needs, or it is directed top-down from a position of regulatory authority. One thing is for sure, it cannot be an awkward mixture of both.

In this context, I want to make it clear once again that CN has not said no to any reasonable request from the Panel. We are genuine in our commitment to improve service for our customers and are prepared to explore any pragmatic solution that is consistent with a true commercial framework. If we expressed a concern about one of your requests, it was only when it was either impractical or inconsistent with how normal commercial markets effectively work.

On that basis, our attached letter of commitment stands, and here are the few clarifications we discussed at our meeting:

**Local Service Change Notification**

We have already implemented a 10-day local service change notification process, which has received broad support from our customers. We will consult with any customer who raises concerns about a change we propose to make. Our CDR process (as written, or as possibly modified following discussions with Transport Canada) will be available to anyone who is not satisfied with their service following a change (not with the change per se).

.../3

**Service Level Agreements**

CN is keen to enter into Service Level Agreements with customers, terminals, ports, and other supply chain partners. We have a solid record of success in this regard, which we have extensively discussed with you. If "boiler plate" Level of Service Agreements are more acceptable to groups of small customers, we are also ready to entertain that approach.

**Public Reporting**

CN is willing to work with Transport Canada and other supply chain participants on aggregated public reporting of end-to-end supply chain performance metrics. We are fully committed to the 2013 review process and will provide all that Transport Canada requires to carry out its responsibilities.

**Our Commitment to Other Participants**

The application of our commitments to other parties, such as ports and terminal operators, is clear from the numerous Service Level Agreements we have already reached with terminals, with whom we have an operational, but not a commercial relationship.

Mr. Chairman and Panel Members, I wish to thank you for your personal commitments to this important Review. I am sure you will reflect on what is the best course to drive continuous improvement in our industry and in the Canadian economy. I urge you, however, to think carefully about the proper policy framework to support innovation and collaboration. For CN, the choice is clear.

Yours truly,

Claude Mongeau
President
and Chief Executive Officer

c.c.: The Honourable Chuck Strahl, P.C., M.P. Minister of Transport,
Infrastructure and Communities
The Honourable Rob Merrifield, P.C., M.P. , Minister of State (Transport),
Transport Canada

Att.

CN

www.cn.ca

**Claude Mongeau**
President and
Chief Executive Officer

935 de La Gauchetière Street West
Montreal, Quebec H3B 2M9
Canada
T 514-399-2963

Président-
directeur général

935, rue de La Gauchetière ouest
Montréal (Québec) H3B 2M9
Canada
claude.mongeau@cn.ca

November 8, 2010

***(via email: RFSR-ESMF@tc.gc.ca)***

Mr. Walter Paszkowski, Chair
Mr. David Edison, Member
Mr. William H. LeGrow, Member
Rail Freight Service Review
Suite 808 - 180 Elgin Street
Ottawa ON
K1A 0N5

Dear Panel Members:

In your Interim Report (the Report), you encouraged the railways to provide a written commitment that specifically addresses the Panel's recommendations in section 6.3. This letter sets out CN's commitments to its customers in the context of the Panel's recommendations. It builds on commitments discussed earlier with the Panel.

As mentioned in our earlier discussions, notwithstanding the concerns we may have with some of the Panel's conclusions in the Interim Report, we are determined to continue with the implementation of our strategic agenda comprised of a comprehensive set of customer-focused initiatives. We have already committed this to our customers and our shareholders as specifically laid out in our April 30th submission to the Panel.

Our submission provided a table summarizing the service improvement initiatives that have been taken or identified for action by CN to address the customer issues highlighted by the Consultants and the Rail Freight Review Process. These broad initiatives are expected to address most if not all of the issues identified by stakeholders. This table has been updated to reflect the additional initiatives that have been undertaken since then and is attached for the Panel's ready reference. CN's commitments described below must therefore be viewed together with these initiatives.

Following are our specific commitments to our customers in the context of the Panel's recommendations:

1. On the issue of notification of local service change, we have already informed our customers in 2009 of our commitment to consult and provide advance notice of the local service changes specified in our communication to our customers. We committed and have extended the current notice from five to ten days and this has already been communicated through a newsletter to our customers and other stakeholders, large and small. A copy of the newsletter is appended for the Panel's information.

2. We are also keen to negotiate service level agreements with all stakeholders, large and small, interested in improving supply chain collaboration in a balanced and measurable manner. CN has already entered into numerous agreements with customers and with all major ports and terminals across Canada, as key stakeholders in the supply chain serving our common customers. We will continue to do so. The nature and contents of such agreements vary depending on whether the other contracting party is a customer, a terminal operator or a transloader. However, each such agreement will typically include performance metrics and dispute resolution provisions, in addition to the parties' respective obligations. For customers with transportation service agreements, the service level agreements are incorporated in the transportation agreements.

3. On the question of a commercial dispute resolution process (CDR), CN has been, since 2006, a strong proponent of such a process as an alternative to existing regulatory recourses for customers. Our pledge in this respect remains unwavering and we will continue to work with our customers to achieve such alternative recourses. This includes our willingness to participate in a mediated-assisted session to be convened by Transport Canada for the establishment of a CDR process that would find broader acceptance in our customer base. I would note that our CDR process allows a customer who is at any time dissatisfied with an existing level of service (local or otherwise) to have the matter settled either via the CDR process or the Agency process, at the customer's choice.

4. CN fully supports reporting and sharing relevant data with customers. In consultation with our customer advisory board, we have already developed a balanced scorecard that includes key metrics for both CN and the customers. We are well underway with the scorecard (in the form already provided, copy of which is attached) and are committed to complete its implementation and extend it to our entire e-customer base in the next few months. We believe that reporting through these customer scorecards will ensure that any service issues will be identified and addressed before they reach a boiling point. To be meaningful and relevant, data reporting must be

either connected directly with service to the customer, as we are doing with the scorecard, or, at a broader level, be connected with supply chain partners, as we are doing with our cooperation agreements with terminal operators and ports.

Additional public reporting could be relevant and provide added value if it included reporting by all key participants in a supply chain. The reported data would need to be connected in a way that each participant's performance be viewed in a transparent manner across the supply chain. CN would be ready to participate in data reporting that provides such end-to-end supply chain visibility if this approach was embraced by the other stakeholders involved in servicing customers. As we have already said, we are also committed to provide all relevant information to Transport Canada or to any body designated by Transport Canada in support of the Panel's proposed 2013 assessment of the implementation of CN's initiatives and commitments.

5. CN welcomes the suggestion that an assessment be undertaken in 2013 to determine the extent to which CN has implemented its initiatives and commitments. While CN believes that its own business and commercial interests are sufficient incentives to sustain such service improvements, we understand that this review will provide a reassuring check point for those who believe that CN may only have implemented these measures for the short term. CN is looking forward to demonstrate that commercial interests and incentives best encourage service innovation and, in fact, work better than any regulatory intervention.

Mr. Chairman and Panel Members, thank you for the opportunity to allow us to reiterate our commitments to our customers and the collaborative initiatives taken in conjunction with our commercial partners for the improved performance of supply chains serving Canadian shippers.

Yours truly,

Claude Mongeau
President and
Chief Executive Officer

Att.

**Table – Summary of CN's Key Service Improvement Initiatives**

| Service Improvements Outlined by Consultants | CN Actions Implemented or Underway | Enduring Impact |
|---|---|---|
| Empty Car Supply | • Changed CN's Guaranteed Car Order to allow customers more ordering flexibility with cancellations and short leadtime<br>• Implemented car order shortfall reorder process<br>• Implemented transformational Western Canada scheduled grain plan<br>• Developed a scheduled service plan for potash shipments<br>• Developing new supply chain efficiencies to help CN better meet short-term car order requirements of major steel producers (strategic cars being staged and car fleet being increased)<br>• Setting up weekly joint conference calls with customers to review performance and to discuss future orders and supply<br>• Improving processes and communication with customers using their private fleet | • Program changes done in consultation with customer advisory board, ongoing dialogue<br>• New order fulfillment scorecard for customers to be available on the web: transparent new measures developed by CN jointly with customers to review success and to improve on an ongoing basis |
| "First Mile - Last Mile" Operational Interface | • Developed switch window performance measure and working to improve ETA accuracy information<br>• Implemented Service change notification process<br>• Signed an agreement with Lynnterm terminal and forest-products customers to produce a more consistent flow of forest-products traffic – CN providing daily service<br>• Setting notification to customers in case of disruptions to their planned service<br>• Developing comprehensive new supply chain approach to managing the flow of coal from mines to west coast terminals | • New metrics to be designed and implemented in consultation with customer advisory board<br>• New switch window performance and ETA accuracy reports will be available on the web: transparent new measures developed by CN jointly with customers to review success and improve continually |
| Demurrage and Billing | • Implemented comprehensive demurrage rules changes addressing bunching, placement outside the switch window and serving yard for cars at destination<br>• Developed audits and website to improve reporting and billing accuracy<br>• Mobilized a cross-functional team to review and streamline the Optional Services billing process | • CN proposes mediation and CDR in addition to existing recourses in the *Canada Transportation Act* to solve future issues<br>• Broad groups of customers have already expressed satisfaction with CN's new demurrage tariffs and rules |
| Customer Service and Issues Resolution | • Undertaking a complete review of CN customer service activities including process re-engineering, standardization, and training<br>• Developing a new and more robust process around issues escalation<br>• Revamping the CN Satisfaction Survey<br>• Improving functionality and penetration of CN suite of eBusiness tools | • Marketing & Sales organizational changes to enhance customer facing activities and deploy senior people closer to customers<br>• Mediation/CDR process to expedite resolution, new CN measures can be used by both parties to support these discussions<br>• Transparent measures shared with customers to pinpoint issues tied into the "dashboard" of CN's eBusiness tools |

118

# 10-day Advance Notice

## When there is a Change to your Local Service

You've been talking to us. We've been listening. You asked for more lead time when there is a change to your local service, which makes perfect sense, giving you time to make the necessary adjustments on your side.

Instead of the current 5-day advance notice, we will be notifying you 10 days in advance of a change in your local service.

**What constitutes a change in local service?**

- A change in the day of week that you are served
- A change to the weekly frequency of service
- A change in the start/stop time of the crew assignment, if the change is more than two hours

We will also continue to advise you as early as possible in the case of an embargo or force majeure, for example a snow storm or disruption on our line that would impact your service, and to provide regular updates on the situation as we do today.

**But you need to sign up to receive the 10-day advance notification**

The 10-day advance notification becomes effective on **November 15, 2010**. In order to receive the notification, you must sign up as soon as possible to ensure you will begin receiving the notifications right away. Please make sure that other people within your organization also sign up as we rely on you to know who needs to be notified within your company and also to keep the advisory distribution list up to date.

- If you or your colleagues are already eBusiness users, login, go to **"My Rail Service"** tool in the Pickup and Delivery section of the Tools homepage, choose your company, location and check the box to be notified. You can add other colleagues email addresses using 'update recipients'

- If you are not currently an eBusiness use, register for eBusiness and follow the steps as per above

We welcome your feedback and comments on this initiative and your Account Manager will answer any specific questions you may have. Let's keep talking. We are listening and we are making changes.

Thank you for shipping with us,

| | |
|---|---|
| Jean-Jacques Ruest<br>Executive Vice President and<br>Chief Marketing Officer | Keith Creel<br>Executive Vice President and<br>Chief Operating Officer |

# Performance Scorecard

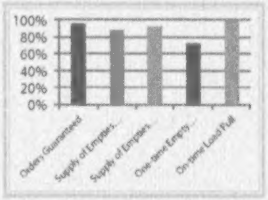
| Company | Origin | Destination | Date |
|---|---|---|---|
| ABC Company | All Locations | All Locations | From January 1, 2010<br>to January 31, 2010 |

Total Shipments selected: 1023

## Origin

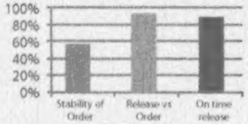
### CN

| | |
|---|---|
| Orders Guaranteed | 96% |
| Supply of Empties against Order Day & Time | 88% |
| Supply of Empties against Order Day | 92% |
| On-time Empty Placement | 72% |
| On-time Load Pull | 100% |



### Shipper

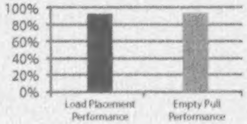
| | |
|---|---|
| Stability of Order | 57% |
| Release vs Order | 92% |
| On time release | 88% |



## Destination

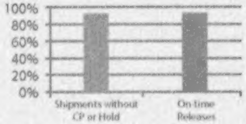
### CN

| | |
|---|---|
| Load Placement Performance | 87% |
| Empty Pull Performance | 92% |



### Receiver

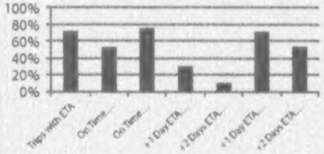
| | |
|---|---|
| Shipments without CP or Hold | 100% |
| On-time Releases | 45% |



## Transit

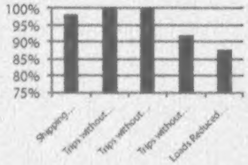
### CN

| | |
|---|---|
| Trips with ETA | 77% |
| On Time Delivery – Full Trip (+/- 4 hours) | 56% |
| On Time Delivery – CN portion (+/- 4 hours) | 78% |
| +1 Day ETA Accuracy – Full Trip (+/- 4 hours) | 30% |
| +2 Day ETA Accuracy – Full Trip (+/- 4 hours) | 14% |
| +1 Day ETA Accuracy – CN portion (+/- 4 hours) | 69% |
| +2 Day ETA Accuracy – CN portion (+/- 4 hours) | 57% |



### Customer

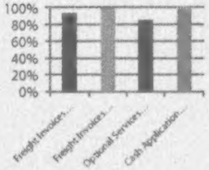
| | |
|---|---|
| Shipping Instructions without Errors | 89% |
| Trips without Diversions | 100% |
| Trips without Holds | 100% |
| Trips without Constructive Placements | 92% |
| Loads Released on Time | 88% |



## Administration

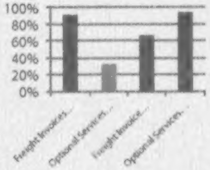
### CN

| | |
|---|---|
| Freight Invoices within 2 days | 96% |
| Freight Invoice Accuracy | 99% |
| Optional Services Invoice Accuracy | 82% |
| Cash Application within 2 days | 99% |



### Customer

| | |
|---|---|
| Freight Invoices paid within terms | 91% |
| Optional Services Invoices paid within | 34% |
| Freight Invoice Disputes declined | 63% |
| Freight Invoice Disputes accepted | 93% |



CN

Example Scorecard

# APPENDIX N

CANADIAN
PACIFIC

**F J (Fred) Green**
*President and*
*Chief Executive Officer*

Suite 500
Gulf Canada Square
401 – 9th Avenue SW
Calgary Alberta
T2P 4Z4

Tel (403) 319-7555
Fax (403) 205-9000

fred_green@cpr.ca

December 8, 2010

Chairman
Rail Service Review Panel
8th Floor, 180 Elgin Street
Ottawa, Ontario
K1P 6K7

I am writing in follow-up to our discussion on December 2nd, 2010. As I indicated at the meeting I stand by my commitments outlined to you in my November 10th letter. This additional correspondence is meant to complement that letter. At the meeting we discussed three items:

1. Your revised regulated dispute resolution concept;
2. "Boiler plate" agreements for small shippers; and
3. Reporting to support a 2013 audit.

With regard to the revised dispute resolution concept, I want to state what I articulated verbally at the meeting. This is a deeply flawed and impractical proposal. To allow shippers to settle commercial terms including a balance between price and service only to subsequently be granted a regulated process concluding with FOA on only service aspects is not rational. The recent use by 5 CP customers of CP's CDR process, which was developed in consultation with shippers verifies that solutions exist already.

You also asked for clarity on "boiler plate" agreements for small shippers. We support the inclusion of "boiler plate" language for small shippers and see merit in developing tools to improve our interface with these important customers. As I have indicated, CP is undertaking a number of initiatives to facilitate how small shippers deal with CP.

In regard to support for the 2013 audit, I repeat our commitment to work with Transport Canada to ensure appropriate confidential reporting is carried out for this purpose.

I remain disappointed that the Panel's "complete supply chain" mandate has not been fulfilled and the impact on all stakeholders of the convergence of container, grain, coal and other events this November in the West corridor vividly illustrate this shortcoming.

The unsubstantiated comments about "market power" which were included in your Interim Report are also flawed. As outlined in Michael Murphy's letter of November 8th, this observation and your commentary is inconsistent with all substantive research that has been completed on this subject and, in any event, is outside of the Panel's mandate.

In closing, I would like to thank you for your work on this important matter. As I have stated many times, Canadian Pacific supports the Government's goal of improving the overall performance of Canada's supply chain.

Sincerely,

F.J. Green
President and CEO

cc: The Honourable Chuck Strahl, Minister of Transport, Infrastructure and Communities
The Honourable Rob Merrifield, Minister of State (Transport)

CANADIAN PACIFIC

Gulf Canada Square
401 – 9th Avenue SW
Calgary Alberta
T2P 4Z4

November 10, 2010

Chairman
Rail Service Review Panel
Suite 808, 180 Elgin Street
Ottawa, Ontario
Canada
K1P 6K7

I am writing in response to your request in the Rail Service Review Interim Report for a letter indicating commitments from the railways to implement measures on a commercial basis that will improve the overall functions of the railway supply chain in Canada. I am including the following commitments on the basis of improving the functioning of the rail freight supply chain and on the understanding that commercial mechanisms are favoured in your Final Report and no additional regulatory measures are recommended. In addition to these measures I would like to reaffirm my commitments as put forward in CP's submission to the Rail Service Review Panel on April 30th, 2010. They were:

- Improve our "last mile" performance by commencing selected Yard Reliability Programs. The first one, which will be a pilot program in Winnipeg this summer, is intended to improve the local service reliability, yard fluidity, and ancillary charge accuracy by adding a placement standard for customers, a process to remove excess yard inventory, adding new measurement capabilities and making appropriate policy changes;
    - *Status: Following implementation in Winnipeg, we are commencing additional Yard Reliability Programs in Toronto this fall and will be moving forward with Vancouver, Edmonton, Red Deer, Moose Jaw, Regina and Montreal next year. Customers will continue to see improvement in overall transit time and service consistency as we implement the reliability programs across our network.*

- Enhance supply chain collaboration by entering into working accords with supply chain partners, including terminals, that delineate respective expectations, performance, monitoring and communication with the goal being to increase overall visibility on elements of active cooperation;
    - *Status: In addition to signing more agreements with customers in the past several months, we have signed accords with two terminal operators in*

*Vancouver. We continue to work on agreements with other supply chain stakeholders.*

- Expand the use of regularly scheduled supply chain sessions with all major customer segments to discuss service parameters, performance and agreed upon service improvements, on a semi-annual basis subject to agreement from other supply chain partners;
    - *Status: We continue to have enhanced dialogue with our broad customer base through increased direct communication, have held a number of sessions with major customers over the past few months and are planning more supply chain sessions with major customer segments over the coming months.*

- Ensure qualified customer service representatives continue to be available to our customers. In short, I am committed to ensuring that when a customer needs to communicate with CP, they be able to avail themselves of our industry leading problem resolution tools to deal with their concerns;
    - *Status: We continue our focus on customer service at CP. Over 98% of customer issues/queries are being resolved within our internal customer service processes.*

- Develop a tailored communications approach for our smaller customers to enable them to better communicate with CP; to meet the specific needs of employees in smaller organizations trying to effectively and efficiently deal with a large company like CP;
    - *Status: As a complement to our Winnipeg Yard Reliability Program we surveyed smaller customers in the region to get feedback on this program over the summer. This input was very useful in improving the pilot. Our account managers subsequently followed up with individual customers who desired additional dialogue on a one-on-one basis. This winter we will be surveying smaller customers across our network to access satisfaction levels with current overall delivery of services. This will allow us to obtain more granular information on approach and customer service problem resolution processes for these smaller customers with the ultimate goal being an improved customer experience at CP for smaller customers. I would also like to note that to date CP has had five small to medium sized customers that have utilized CP's commercial dispute resolution (CDR) offering. Four of these have been settled while one remains active. These smaller customers see benefit in this cost effective, streamlined process to resolve disputes that have not been dealt with through our internal customer service processes. We have also increased the visibility of our CDR offering on our website.*

- Increase the use of technology by our staff to improve overall data accuracy. For example, specific tools such as the recent deployment of Automatic Inventory Reporting (AIR) tablets improve the accuracy and timeliness of demurrage administration.
    - *Status: Between April through to October 2010 deployment in Canada has moved from 80 to 90% of our conductors in local service. This involved the deployment of 280 units. We anticipate reaching full deployment in Q4 with final local area network connections being installed in rural locations.*

I also commit to implement the following measures as noted in your Interim Report:

- To have a consultation process for implementing changes in local train service, and providing a minimum notification period of 10 working days. This change will include a mechanism for resolving service change disputes through an appropriate dispute resolution mechanism;

- To enter into good faith negotiations to establish service agreements upon request by stakeholders who have an operational or commercial relationship with CP. Elements of service agreements may include: services and obligations of the railway and obligations of the other party, communication protocols and escalation, traffic volumes, key performance metrics, performance standards, consequences of non-performance (including penalties), dispute resolution and force majeure. CP would like to note that we have service agreements in place now with many key supply chain partners;

- To participate in discussions, assisted by a facilitator appointed by Transport Canada, with direct stakeholders, including shortlines, with whom CP has a commercial or operational relationship, on a fair and balanced dispute resolution process;

- To consult with customers, upon request, to develop acceptable and meaningful reporting at a confidential bilateral level. The confidential scorecard could include information such as the customer's first and last mile service, order fulfillment and overall origin to destination service.

- To work with Transport Canada to develop a set of non-commercially sensitive metrics upon which we will publicly report.

I would like to thank you for your work on this important matter. As I have stated many times, Canadian Pacific supports the Government's and the Panel's goal of improving the overall performance of Canada's supply chain. The commitments I have included in this letter will contribute to ensuring this goal is achieved.

Sincerely,

Fred Green
President and CEO, Canadian Pacific

Cc: Honourable Rob Merrifield, Minister of State (Transport)

# APPENDIX O

QGI
CONSULTING

Suite 701 9707 - 110th Street
Edmonton, AB
T5K 2L9
Phone: (780) 447-2111 Fax: (780) 451-8710
info@qgiconsulting.com

June 24, 2010

Walter Paszkowski - Chairman
Bill Legrow
Dave Edison
Rail Freight Service Review Panel
Suite 808, 180, Elgin Street
Ottawa, Ontario
K1A 0N5

Dear Sirs,

We are writing in response to concerns that have been raised by some stakeholders regarding the use that is being made by the railways and others of the reports that QGI prepared for the rail freight service review.

In particular, we have been contacted by stakeholders who are very concerned that statements in our reports are being used by the railways to imply that QGI's analysis of railway service can be interpreted in such a way as to conclude with certainty that there are no problems with a lack of market competition in the Canadian freight rail industry.

In our view, this is an overstatement of our analysis and our conclusions. We did conclude that in a number of areas where one might expect to find a differentiation in service levels – I.E. by customer size or access to direct railway competition – we did not find evidence of systemic differences in service levels.

However, in order to draw any definitive conclusions about the competitive structure of the industry we believe much more analysis would be required. In particular, an examination of relative freight rate levels of various segments of the customer base would be needed.

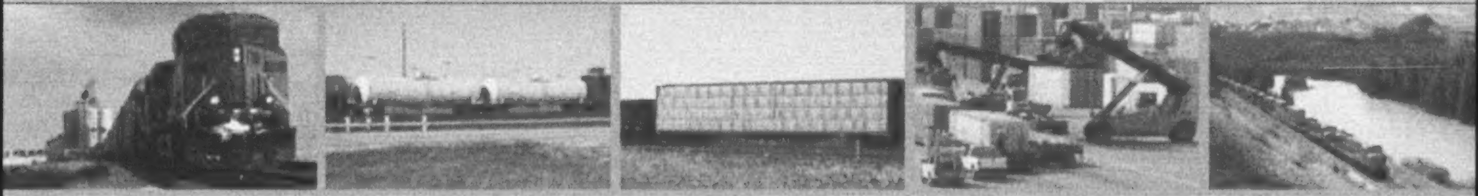
Indeed, our Operating Practices report which identified serious problems with a lack of responsiveness of railways and evidence of a lack of collaboration between railways and their various stakeholders could be seen as evidence that problems due to limited competition in the industry do exist.

If you would like to discuss this issue further or if you have any questions as to how our reports should be interpreted, we are of course available to assist you.

Sincerely,

Milt Poirier
QGI Consulting
cc Robert Moore, Mark Hemmes, Neil Thurston

# APPENDIX P



## APPENDIX P – PROPOSED FRAMEWORK FOR THE 2013 ASSESSMENT FROM THE INTERIM REPORT

**Note:** *The following framework is extracted from the Interim Report (section 6.6)*

The proposed 2013 assessment is an integral component of the Panel's package of recommendations. The objective of the assessment will be to determine the effectiveness of the railways' commercial initiatives, including an evaluation of stakeholder behaviour, in negotiating and implementing the commercial elements of the Panel's recommendations. The 2013 assessment will determine whether or not rail service is adequate and, depending on the outcome, could trigger implementation of the regulatory proposals contained in the Panel's package.

The Panel proposes that the mandate of the person or persons appointed to carry out the assessment would consist of the following components:

- an assessment of the railways' initiatives and commitments to the Panel;
- a quantitative assessment of key performance indicators;
- stakeholder consultations; and
- an assessment of stakeholder behaviour in commercial negotiations.

The assessment would be conducted within a six-month period.

### An assessment of the railways' initiatives and commitments to the Panel

To assist the 2013 assessment, the railways should be required to report on their initiatives and commitments by confirming the extent to which these have been implemented. They should also comment on their success in achieving an adequate level of service. The report should also include information on the implementation of service agreements; the use of commercial dispute resolution processes; and the extent of confidential bilateral reporting and public reporting at a sector level. The railways' reports should be made public, to provide an opportunity for other stakeholders to respond.

### A quantitative assessment of key performance indicators

The 2013 assessment should include an analysis of key performance indicators. The KPIs should be developed in consultation with industry stakeholders. It is suggested that Table 5 (Table 6 in Final Report) be used as a starting point. Enhanced performance reporting is aimed at providing better visibility to individual shippers to help them prepare for their negotiations with the railways on establishing service levels and resolving service issues. It will also provide better information for addressing systemic service and other public policy issues.

### Stakeholder consultations

The 2013 assessment process should include written submissions from all stakeholders, including the railways, on their views regarding the success of railway initiatives to improve service. Non-railway stakeholders could include any complaints they may have about service failures. The process would provide an opportunity, at the reviewer's discretion, for consultations.

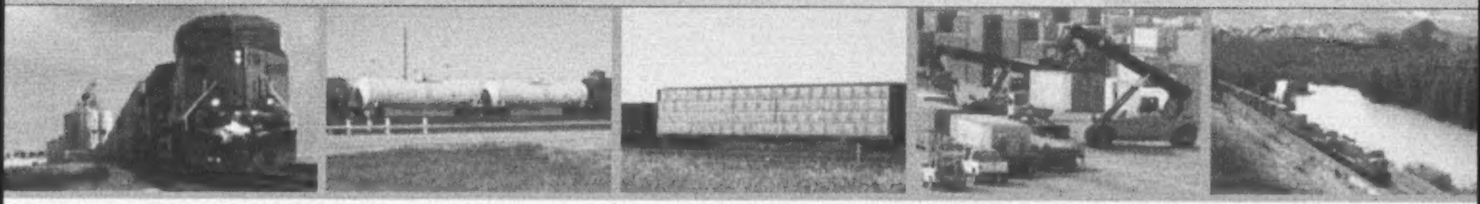
### Assessment of stakeholder cooperation

The 2013 assessment should take into consideration feedback from the minister-appointed mediator regarding the dispute resolution negotiations and the willingness of stakeholders to find a common dispute resolution process. The 2013 assessment should also consider feedback from stakeholders on the general willingness of parties to work collaboratively on the Panel's proposed commercial approaches in relation to the other key recommendations. The assessment will need to take into consideration the potential legitimate and reasonable differences of opinion on how some issues should be addressed.

### 2013 assessment recommendations

The person or persons leading the 2013 assessment would be mandated to provide recommendations to the Minister on whether commercial solutions were successful or whether regulatory changes should be triggered.

# APPENDIX Q



## APPENDIX Q – GLOSSARY OF ACRONYMS

| | |
|---|---|
| AGENCY | Canadian Transportation Agency |
| CDR | Commercial Dispute Resolution |
| CFI | Canadian Fertilizer Institute |
| CLR | Competitive Line Rates |
| CN | Canadian National Railway |
| CP | Canadian Pacific Railway |
| CRS | Coalition of Rail Shippers |
| CTA | *Canada Transportation Act* |
| CV | Coefficient of Variation |
| CWB | Canadian Wheat Board |
| ETA | Estimated Time of Arrival |
| FOA | Final Offer Arbitration |
| KPI | Key Performance Indicators |
| LOS | Level of Service(s) |